



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

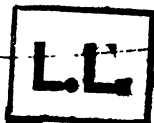
Cw. U.K.

690 • 5

S 491

L. Eng. B. 75. e.

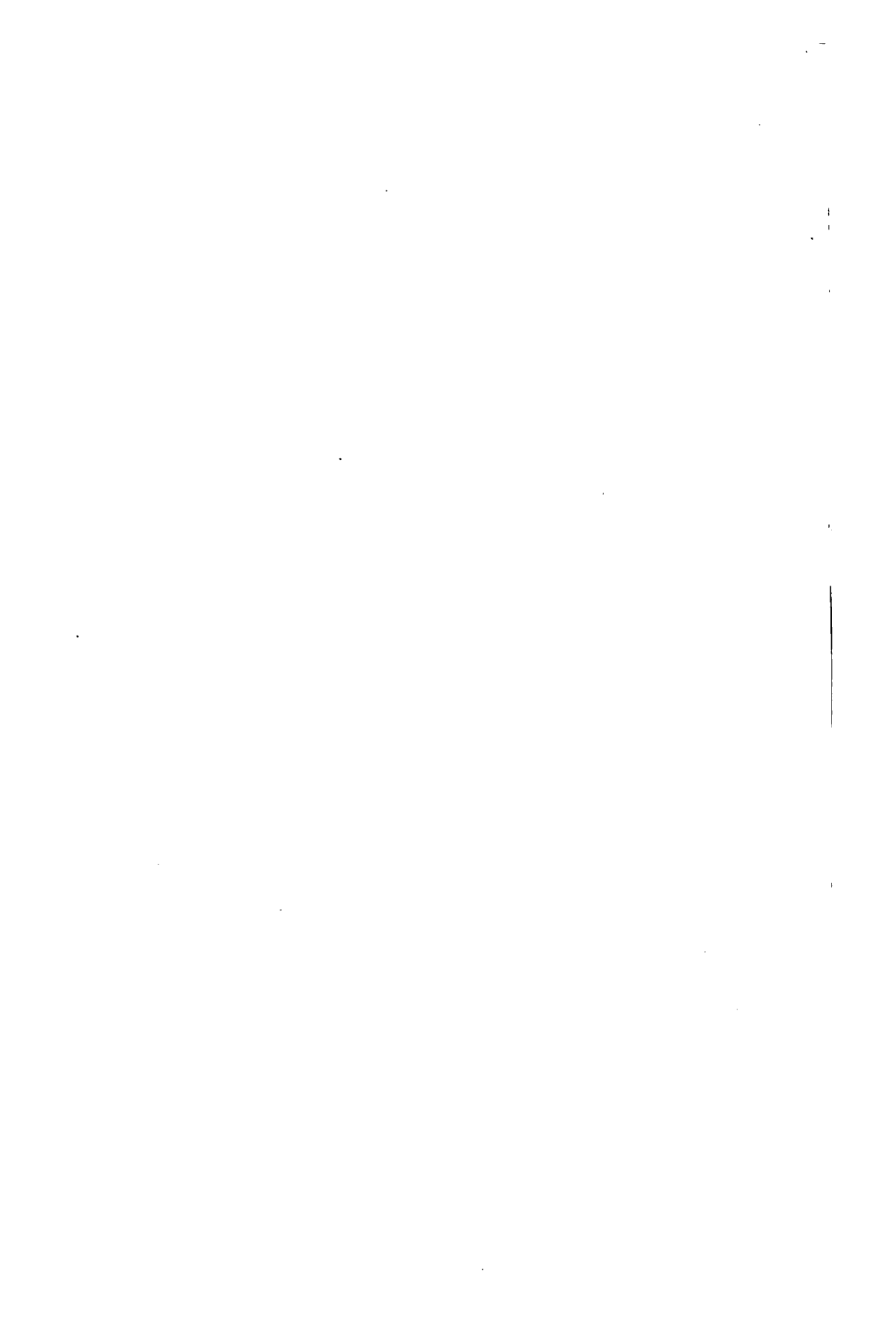
Murder 15



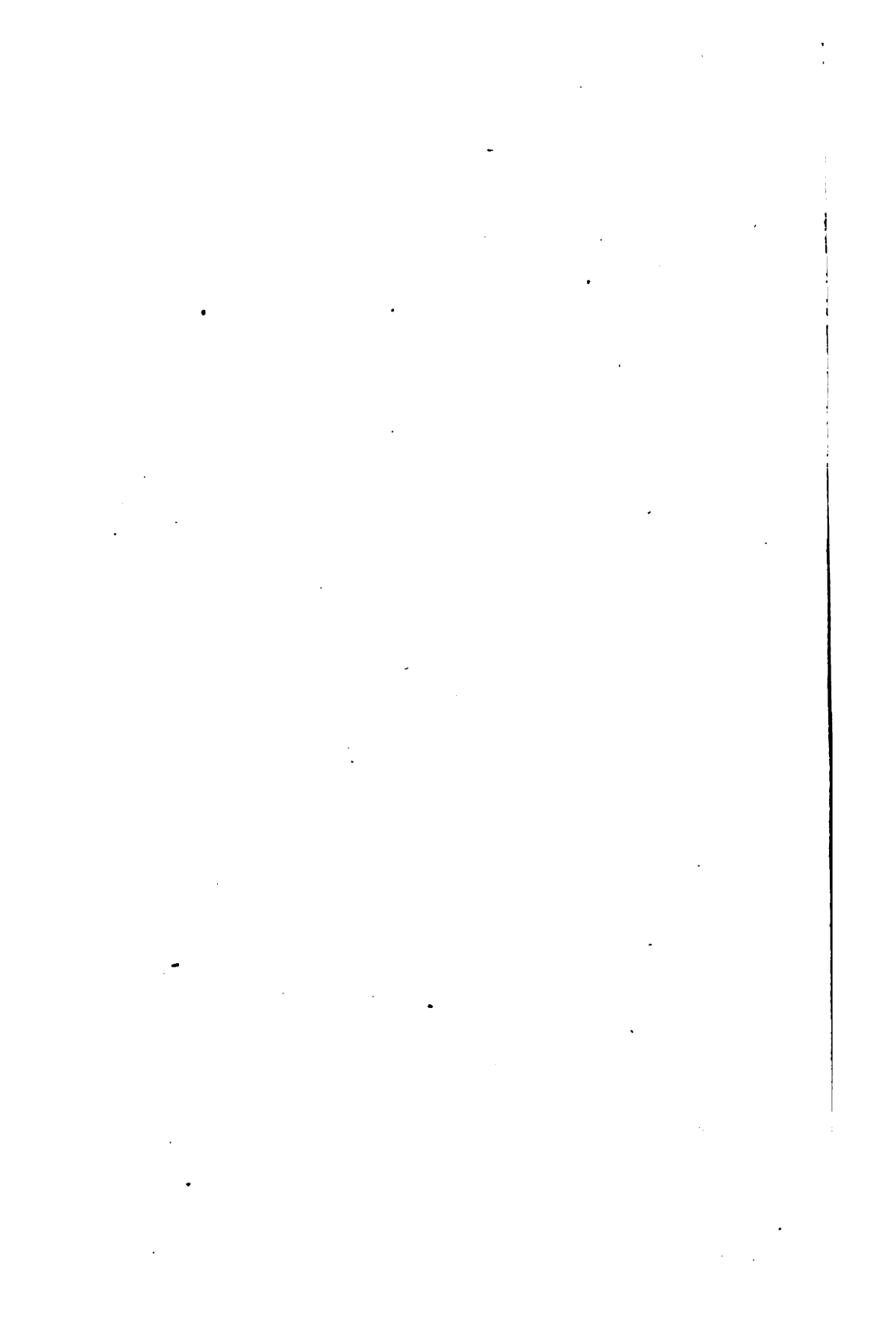
CW . U. K.

690.5

S 491



THE CASE
OF
THE QUEEN,
AGAINST
SERVA AND OTHERS.



THE CASE
OF
THE QUEEN,
AGAINST
SERVA AND OTHERS,
INCLUSIVE OF
THE TRIAL,
AND
THE ARGUMENT BEFORE THE JUDGES.

By W. B. HEWSON, Esq.

OF THE INNER TEMPLE, BARRISTER AT LAW.

LONDON:
WILLIAM BENNING & Co., LAW BOOKSELLERS,
43, FLEET STREET.

1846.



LONDON :
PRINTED BY RAYNER AND HODGES,
109, Fetter Lane, Fleet Street.

P R E F A C E.

It is much to be regretted that no judgment should be delivered in Crown cases. The fiction by which every man is supposed cognizant of the law, is grounded not only on the necessities of government, but on the supposition of the law being made public and accessible to every body. Ignorance of the criminal branch of it is not more tolerated than of any other, and is likely to be attended with more serious consequences; it is difficult, therefore, to say on what principle the reasons of decisions in criminal cases should be confined to the knowledge of the Judges, while in all others they are given to the public. The injustice indeed of feigning every man perfectly cognizant of a branch of the law, concerning which some information which might be given is withheld, scarcely seems excusable on the mere ground of established custom. Had a judgment been delivered in *Depardo's* case, possibly the seven prisoners tried at Exeter might have been spared imprisonment for four months, under sentence of death. In coming to the conclusion that they were wrongly convicted, the Judges have

decided some important questions, before doubtful, and their judgment, if pronounced, would probably have thrown light upon many others. Every civilized country would have heard with interest and profit the opinions of the English Judges, respecting the principles on which the jurisdiction of a country over foreigners is based, and the extent to which it reaches: respecting the right of search:—the meaning of the word piracy, when applied by treaty to an act not piracy by the municipal law of the country, or by the common law of nations: and the general principles of the interpretation of treaties. It would have been important for the owners of the numerous Brazilian vessels which have been condemned by the Mixed Commissions, and for our government, to know under what circumstances captures have or have not been lawful.

In the absence, however, of information so much to be desired, it may not be useless to state briefly the case, and as much as is known of the judgment; and to inquire what probable consequences may be deduced from it.

In 1826, a treaty was concluded between this country and Brazil—the first article of which declared that after the expiration of three years from its ratification, the “being concerned in the carrying on” of the slave trade should be unlawful to Brazilian subjects, and the “carrying it on should be deemed and treated as piracy.” The other articles adopted “*mutatis mutandis*” our former treaties with Portugal, and the additional articles appended to them, the effect of which may be stated shortly, as giving to cruisers of our Navy, provided with special instructions in compliance with the treaty, and to no other vessels, the power of capturing Brazilian vessels on board which slaves were found, or on board which there was clear and undeniable proof of slaves having been

during the voyage—and stipulating that in no case should a vessel be searched by an officer under the rank of lieutenant. A separate article declared that the conditions of search and capture, and the instructions should remain in force (if not altered by mutual consent) for fifteen years after the total abolition of the slave trade on the part of Portugal. Upon this treaty the Brazilian and English Governments have put different interpretations. The English Government, after the expiration of the three years of lawful continuance of the slave trade on the part of Brazil, have considered that British cruisers have had a right to take vessels *merely equipped* for the slave trade, on the ground of their carrying on what by the treaty is termed piracy. The Brazilian Government have contended, that so much of the adopted Portuguese treaties as prescribed the conditions of capture, made unlawful the capture of all vessels not having had slaves on board during the particular voyage. The Courts of Mixed Commission established at Sierra Leone and Rio de Janeiro, have consisted of two Judges and two Commissioners of arbitration, one Judge and one arbitrator chosen by each Government. The Judges are directed in case of disagreement to draw lots for the choice of an arbitrator, whose decision is to be final.* The practical result has been that in case of a vessel being brought to port *merely equipped* for the slave trade—the Judges have always disagreed, and have always drawn lots for the choice of an arbitrator—and the vessel has been condemned or acquitted according to the hazard of the die. There are only four cases on record in which a Brazilian Judge has

* See regulations for Mixed Commissions attached to the Convention with Portugal in 1817, recited in 5 Geo. 4, c. 113.

agreed to the condemnation of a vessel merely equipped, and that same Judge has since overruled those decisions.

The English Government in 1834 issued fresh instructions to English cruisers, different from those appended to the Portuguese treaty, authorising the capture of vessels with certain equipments; other instructions of a similar kind have since been issued. In 1839, a treaty was concluded between the English and Brazilian ministers at Rio, authorising the capture of vessels equipped: at that time, however, the Emperor of Brazil was in his minority, and the States General, whose ratification during the Emperor's minority was necessary to make the treaty binding on Brazil, refused to ratify it. Before and since that time the Brazilian Government have uniformly protested against the capture of vessels merely equipped.

The *Felicidade* was captured (having surrendered) on the ground of being merely equipped, by the *Wasp*, an English cruiser having the original and also the subsequent instructions on board. Her crew, with the exception of two, were removed to the *Wasp*. A lieutenant, a midshipman, and some English sailors were placed on board her with the jolly-boat of the *Wasp*, in which the British ensign was flying, and were dispatched in pursuit of a vessel seen in the offing, from the *Wasp*, but not from the *Felicidade*.

Fifty-two hours after, the *Echo*, a Brazilian vessel with slaves on board was taken (having also surrendered). The midshipman went on board her in the jolly-boat by the direction of the lieutenant, and returned with a portion of the crew. The lieutenant then went on board the *Echo*, leaving the midshipman in the *Felicidade*. The crew of the *Echo* that

were left on board the *Felicidade*, and one of the crew of the *Felicidade*, rose and killed the midshipman and all the English on board, and took possession of the vessel. They were subsequently recaptured by another English cruiser, and brought to this country for trial, and were convicted of murder. The Judges have held that this conviction was wrong.

All that can be stated authoritatively respecting the decision is, that the prisoners have been held not to have been within the jurisdiction of this country. It is believed, moreover, that the Judges have been of opinion that the *Felicidade* was unlawfully captured, and on the ground (perhaps amongst others that she had not, and had not had slaves on board.

Were there indeed no other grounds for this belief, the decision that the prisoners were not within the jurisdiction, seems to involve the illegality of the capture of the *Felicidade*. It was admitted by Dr. Addams, in the last argument, that had the *Felicidade* been lawfully captured, there would have been such an incipient conversion of the property, or at least such lawful possession on the part of the Queen of England, as to establish the Queen's jurisdiction on board her. It was admitted in the former argument, that a person captured in pursuance of a treaty to which he has, through his Government, subscribed, must be taken to have consented to be in the custody of the capturing country, and in virtue of that consent to owe allegiance to its Sovereign, and be subject to its laws. Majaval then, if not the others, would have been within the jurisdiction. It was indeed thrown out by Mr. Baron Alderson, that a ship might be considered for some purposes a floating island, and that the question might arise, whether in a foreign ship, even lawfully captured, the law of the country to which it belonged might not prevail, till altered by the Queen. Ships, however,

being within the Admiralty jurisdiction, are not considered by our law, *quoad* jurisdiction, islands: if they were, it would seem to follow that the Brazilian law would still prevail on board a condemned slaver, purchased and manned by English, until altered by the Queen in Council.

The simplest definition of the jurisdiction of the Admiralty on the high seas seems to be, that it extends over the subjects, and the subjects only, of the Crown of England, where-soever, or in whatsoever vessel found: and the inquiry as to the nationality of a vessel, or the conversion of the property in her, seems but subsidiary to ascertaining whether or not the person to be tried is a subject. Assuming this view to be correct, and assuming, as it was contended in both arguments, and is laid down by the best writers on international law, that the jurisdiction of a country over foreigners is founded on consent; assuming moreover a capture in pursuance of a treaty to be a capture by consent, drawing with it allegiance, and constituting the temporary relation of subject; it follows, that if the crews of the *Felicidade* and the *Echo* were lawfully captured, they would have been triable in this country on the ground of being subjects on the high seas—without any question arising respecting the nationality, or conversion or incipient conversion of the property in the vessel. If this view be correct, they would have been triable here, although a child born at the time of the offence, on board the *Felicidade*, would have been born in Brazil.

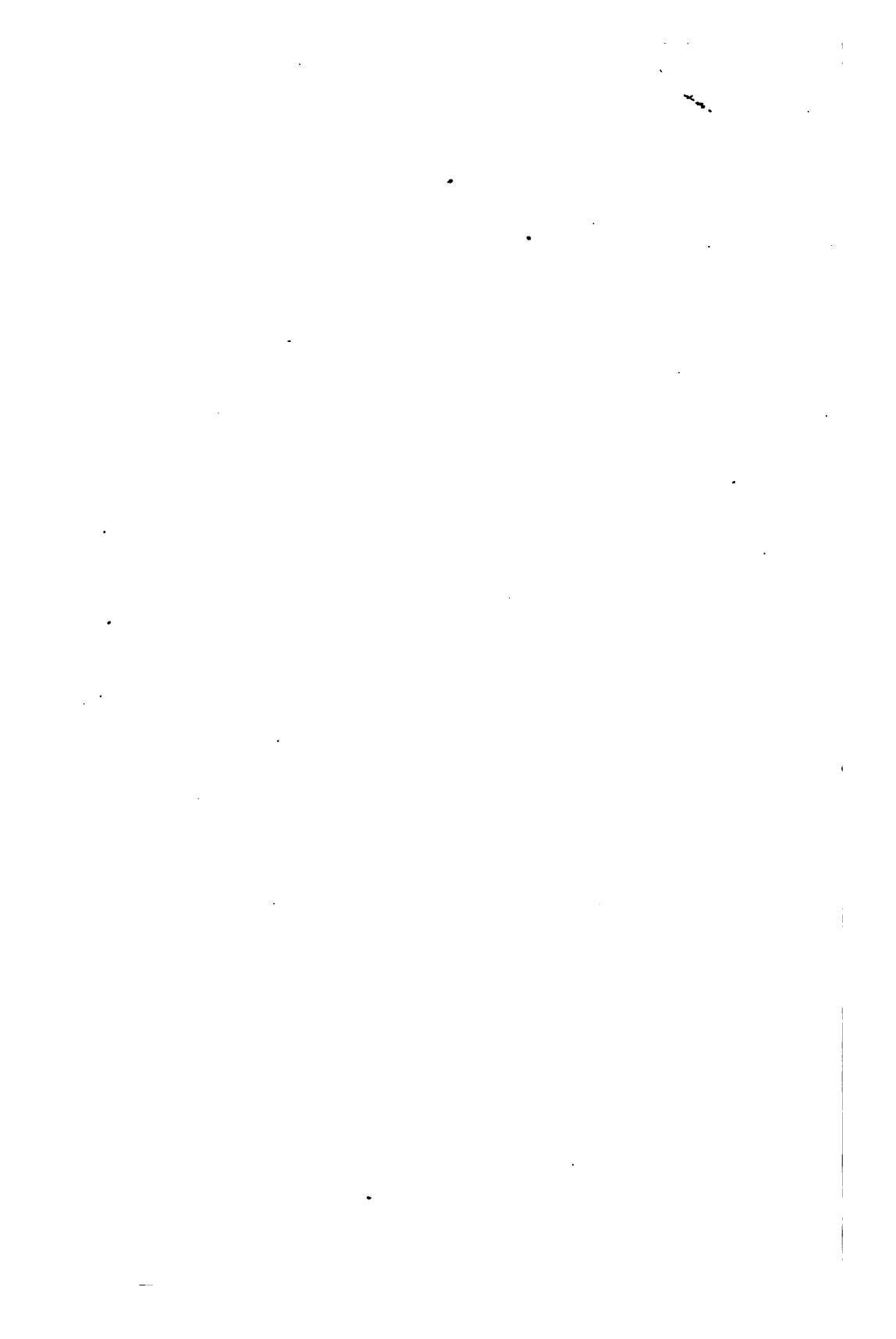
It does not necessarily follow that if the capture of the *Felicidade* was unlawful, it was so on the ground of no slaves having been on board her: it may possibly have been thought that the English Government possessed no powers of search and capture, until the notification to them

of a Brazilian law confirming the treaty, or that the Wasp was not properly qualified to capture: such, however, is believed to have been the ground of the decision;—and seems, indeed, the only valid ground on which it can be based.

It cannot be strictly inferred from the decision that the capture of the Echo was illegal; that it was so, however, appears scarcely to admit of a doubt.

It was ruled by the learned Judge at the trial that the Echo was lawfully captured, because the Felicidade was a boat of the Wasp: the cases of the *Melomane* and *Donna Barbara*, quoted in both arguments (to which it is probable his Lordship's attention was not drawn at the trial), are strictly in point so far as to establish, beyond a doubt, that the Felicidade could not have been a boat of the Wasp: this ground, on which the learned Judge seems to have rested his opinion, failing, it is difficult to conceive another on which the capture can be supported. The presence of the jolly-boat, it is conceived, cannot alter the question.

An important question remains yet to be determined—whether, the fifteen years having expired, and the first article of the treaty, declaring the slave trade piracy on the part of Brazilian subjects, remaining in force alone, we retain any power to search and capture Brazilian vessels, and whether the 8 & 9 Vict. c. 122, passed last session, giving general powers to the Admiralty to adjudicate on Brazilian slavers, taken as pirates, is one which, *jure gentium*, we had a right to enact.



THE TRIAL.

(From the Short-Hand Writer's Notes.)

FRANCISCO Fereira Santa Serva, Janees Majaval, Manual José Alves, Florence Riberio, Juan Francisco, José Maria Martinez, Antonio Joaquim, Sebastian de Santos, Manual Antonio, José Antonio, were indicted at the Summer Assizes, held at Exeter in July 1845, for the murder of Thomas Palmer. The indictment contained six counts, the first of which charged the prisoner Janees Majaval with stabbing the deceased, and the others with aiding and abetting. The second charging Majaval with killing the deceased by means of a blunt instrument, and the others with aiding and abetting. The third charging Majaval with killing the deceased by drowning him, and the others with aiding and abetting. The three latter counts of the indictment differed only from the former three in charging the offence to have been committed against some person to the jurors unknown.

Mr. GODSON, Q. C., Mr. COCKBURN, Q. C., Mr. HAYWARD, Q. C., and Mr. POULDEN were Counsel for the prosecution; Mr. Serjeant MANNING and Mr. COLLIER for the prisoners.

On the indictment being read, Mr. Serjeant *Manning* demurred, on the ground that it did not conclude "*contra formam statuti*," and cited the case of *Rex v. Cordy*, 3 Car. & Payne, p. 425, to show that although no objection could be taken to the indictment except by demurrer, it was in the power of the learned Judge to defer the discussion of the point till after the verdict.

PLATT, B.—For what purpose do you cite this, Mr. Serjeant *Manning*? You have already demurred, and I am

ready to hear you. I do not want a case to tell me what I should do.

Manning, Serjt.—My objection then is this. The indictment states, “that the prisoners, with force and arms, upon the high seas, in and upon one Thomas Palmer, in the peace of God and our lady the Queen, then being in a certain vessel known as the Felicidade, did feloniously and wilfully make an assault.” Now this being a statutable offence, ought to have concluded “*contrà formam statuti.*”

PLATT, B.—What is the statute that makes murder on the high seas an offence?

Manning, Serjt.—The 28th Hen. 8, c. 15.

PLATT, B.—They used to treat murder as an offence before the time of Hen. 8.

Manning, Serjt.—Yes. But murder on the high seas was cognizable by the civil Court prior to that, and not now being an offence at common law, it is incumbent on the prosecutor to state that this offence was committed against the form of the statute.

Mr. Collier.—Lord *Coke* defined murder at common law to be an offence committed in some county of this realm. If not committed in any county, it cannot be cognizable by this Court unless it be made so by some statute.

PLATT, B.—It appears to me that this crime of murder upon the high seas, was cognizable by the Lord High Admiral before the statute of Hen. 8. The statute of Hen. 8 was passed for the purpose of amending the law and declared that the mode of trial should be according to the common law of this realm, by which means those who were to be tried, should be entitled to a jury. The crime remains the same, and is not touched by any statute.

All the prisoners now pleaded *Not Guilty*.

Mr. Godson then said, may it please your lordship, gentlemen of the jury, it is my duty, with the assistance of my learned friends, to lay before you the particulars of this most important case where ten men have to answer for the death of the person

set forth in the indictment, as one of several Englishmen who were killed upon the high seas. I am sure that I need not request your most earnest attention to all the facts as they appear in evidence ; and that you will give to all these facts, not only that attention which they may respectively require ; but if there should be any doubt with respect to any of the expressions used, you will give to the meaning of the words used, that which would be the most favourable to the prisoners. If they were Englishmen I would give you this caution, but being foreigners, I am sure that you will, in the best manner in which you can discharge your duty ; leaning rather to the prisoners than against them, and that you will in the discharge of your duty, rather be drawn by any facts against them, than be led by any feelings of your own. I am glad that the prisoners have requested that six foreigners should be on the jury ; because the law of England required in its mercy, that not only shall justice be well and truly done, but that all precautions should be taken, so that no man should be able to say when a verdict was pronounced, that anything had been neglected which should make that verdict a true and just one. I am also glad that the prisoners are on this occasion defended by my learned friend Serjeant *Manning*, and also my learned friend Mr. *Collier*. Because they will have every assistance which it was possible for learning and thorough experience to bring to their case. It was gratifying to us (the learned counsel for the Crown) to find that they will be so defended ; because if it were otherwise, if the prisoners were left without counsel, our task would be much more irksome and onerous than it is. The case is one of great novelty, as one of a class which is to be tried for the first time in a county not Metropolitan—I believe it is the first time such a case has been tried at any assizes, certainly the first that I am aware of, in which any persons have been tried for murder on the high seas at a county assizes. But that will make no difference, because the law of England is the same in one part as another, and will be administered with the same purity in all parts of the kingdom alike. The offence with

which the prisoners are respectively charged is this—that one of them, the one next the Jury, (Majaval) that he, with a knife, stuck and stabbed Thomas Palmer, who was a midshipman in her Majesty's service at the time, and that the others were there aiding, abetting, and assisting. You have also heard that another part of the charge is that they threw him overboard, and he was drowned. That is put in the indictment, in case any objection should arise as to whether he was actually dead at the time he was thrown into the sea, or whether being actually dead, he was thrown in afterwards.

Now my duty in this part of the case is very simple. It is to state to you the facts that we intend to prove, in order to make out this charge plainly—to prove it without any exaggeration, or any veil upon it. I shall simply detail to you a narration of the history as it has occurred, and as it will be proved before you. I will then state what I conceive to be the law upon the case—but that, by and by, you will hear from my lord. Now the facts which are the ground-work, are these :—A vessel, called the *Felicidade*, was equipped at Bahia, in the kingdom of the Brazils, for the purpose of carrying on the slave trade on the coast of Africa. A person of the name of Cuqeira, was the master or captain of that vessel, and he came on the coast of Africa with a large crew, for the purpose of taking in a large load of slaves. The English cruisers being there at the time, he was chased and ran out to sea. He, coming back again was chased three or four times, the particulars of which I need not go into. At last the vessel was taken by the crew of the *Wasp*, one of her Majesty's ships. The particulars of the taking you will hear from the witnesses. But the vessel being so taken, Lieutenant Stupart, and sixteen men, and a midshipman of the name of Palmer, were put on board, the crew of the *Felicidade* being, as a matter of course, prisoners, and the vessel was about to be taken to Sierra Leone, to be adjudicated on. On the morning of the 1st of March, another slaver was seen at a distance. Lieutenant Stupart immediately gave chase, and leaving the *Felicidade*, in

his boat, with English colours flying, he approached this second vessel the Echo brigantine. Now this vessel, the Echo, had also come from Brazil. She had been upon the coast—she had taken in a cargo of slaves upwards of 400 in number, the tonnage of the vessel being something less than 70 tons. When Lieutenant Stupart approached the Echo in the English boat, with the English flag flying, you may easily imagine that the persons on board, seeing him come from a Brazilian vessel, would, at first, imagine that they were from his nation; they hailed them, and were told in return that they were English. The moment they found they were English, the Echo immediately sailed off. These facts are most important to be borne in mind. The prisoners had come from the same country in these two vessels. They came from the Brazils. They all speak the Portuguese language, which is the language spoken in the Brazil. The Echo escaped for that night, but the next morning the English still pursued her in the Felicidade, their prize, and at length overtook her; and an officer from the Felicidade, in a boat, boarded her. In that state of things Lieutenant Stupart had two prizes. He had but himself, the midshipman, and sixteen men altogether. He therefore divided them: part he took with himself on board the Echo, and part he left on board the Felicidade. His first object was to relieve the negroes who had been without food for eight and forty hours. He left in the Felicidade, a book in which was his name written, "*Herschell's Astronomy*," a fact which you will find important hereafter. He took with him seven men, intending to come back the next morning. Mr. Palmer and nine of the men he left behind. Before he left for the night, they made an interchange of prisoners from one vessel to the other for the purpose of better custody. Lieutenant Stupart thought, in the execution of his duty, and every one will agree with him, that with such a small number of men, the best way was to divide the crew.—I think there were as many as twenty-eight in one vessel, and twenty-two in the other. He therefore brought from the Echo all the prisoners

at the bar, excepting the one next you, Majaval, who was cook on board the Felicidade.

Now I may observe here, that if Lieutenant Stupart had a right to take the Echo, he had a right to use all means to keep them in custody. And if it was necessary for that purpose to take them on board the other vessel, he had a right to do so. Part of the prisoners were put into a boat at the stern of the vessel for the same reason—they were eight in number. At the time I am now speaking of, the Felicidade was commanded by the midshipman, Thomas Palmer, and he had with him seven Englishmen and two Kroomen—that is, natives of the coast of Africa, who are employed and carried on the books of her Majesty's ships of war. In the morning—and this is the period to which I call your particular attention—a conversation arose, which being conversation, I will not relate to you, because I would rather that you should hear it from the witnesses themselves, because we all know how conversations differ when related by different persons. But in the morning, while Mr. Palmer was combing his hair, at one end of the vessel, and talking to Mullings, the boatswain, Majaval and others, but certainly in particular, the second man, who was master, or captain of the Echo; he was on board at the time, and the captain of the Felicidade, Cuqueira, was also on board. It would appear as if the Englishmen, wearied, were some of them asleep; Serva approached the hatchway, where the other prisoners were, down below, and called to them to come up on deck, and Majaval ran up to Thomas Palmer, the midshipman, stuck him with a knife, about eight or nine inches in the blade, and then taking him by the legs threw him overboard. I draw your particular attention to the conduct of Cuqueira, at this moment. He was the captain of the Felicidade, on board his own vessel. He gave no countenance to what was going on; but on the contrary, behaved in a manner which entitles him to your confidence this day. From the moment that he heard what they were about, he immediately went to Mullings, the boatswain, and told him by signs,

that they were coming up the hatchway, upon which Mullings went and got a piece of iron, and afterwards a handspike to defend himself as well as he could. He was afterwards killed. Serva then went to the helm, and relieved the Englishman there, that he might go to the assistance of his brethren. And therefore, with respect to that witness, I look upon him as a person who did not from the beginning of the transaction, interfere for the purpose of assisting, but did not interfere for the purpose of preventing the mischief which afterwards happened. I have narrated to you how Palmer was killed. I shall not go into any particulars as to how any of the others were killed. But it is sufficient for me to state, that the whole of the Englishmen on board of that vessel were killed. Mullings defended himself bravely, and inflicted wounds upon four or five of these men.

It is necessary that I should state this fact, because, having ten men before you, if there be any circumstances by which I could distinguish the conduct of any one man, it would not only be my duty, but it would be a pleasure so to do. Now those who received wounds must have been engaged in the fray. There were three men, the last three, namely, Joaquim, De Santos, and Antonio, against whom no individual acts would be proved. They were aiding and assisting. But though they may be guilty of the crime, I would distinguish between those who were acting and assisting, and those who, if they were aiding, we have no evidence of it. I would mention to you that there was a boat at the stern of the vessel, in which a portion of the crew were, because it was considered more prudent to keep them apart from the others—the English being so few. In that boat was a young boy, who will be produced as a witness, and who certainly did not, from the beginning to the end, take any part in the killing of Palmer and the rest of them. He will, therefore, be presented to you as a witness, clear of any stain, further than being in the boat. He could not run away. He could not avoid seeing what was done, but being in the boat he was rather compelled to see and hear what

was going on. But there was a third witness, a young negro, who, up to that time was a slave, and who had been brought in the Echo from Brazil, and had been transferred to the Felicidade. He was down in the hold, and heard all their conversation. He tells us that there was one man, Riberio, who was unwilling to go upon deck, until he had been called a coward, or until expressions of that kind had been used towards him—who said, “Well, if you mean to go, I am willing to go.” He went up, but whether he took any part in the fray is not known, because of the confusion. I mention it, because it is a fact that until he had been called a coward, and had been urged to go on deck by means of the hatchway, he did not act at all to compromise him in it. The negro boy was also threatened if he did not go and assist. However, fear prevailed. He did not go on board till the whole had passed away. Therefore he will also appear before you as a competent witness, not as a person engaged in the transaction, by which death was brought upon all these people.

I shall therefore present to you three witnesses, who were objecting to this occurrence. I shall call two persons from the Echo, one, by birth a Frenchman, but by adoption a Brazilian; and the other a servant of the master, Serva, who will give you an account of the transaction. The negro boy will also give you an account, all of which will be confirmed by other testimony, of which I will now make mention. After Lieutenant Stupart had left the Felicidade and gone on board the Echo, he left behind a book; and of course the men would have many articles, which would be marked by her Majesty’s mark. The Felicidade being now left in charge of Serva, and having these things on board, he ordered everything belonging to the English to be thrown overboard. This done, and having at once the command of the vessel, he suggested to his companions that they should now go and take the Echo. Accordingly, he sailed close to the Echo; he discharged two guns at her, and then went down by the Echo and sailed right away. The Felicidade had the Brazilian colours flying at the time, and

sailed away under them ; she remained away three days, when her Majesty's ship *Star* took her, and then she was sent, under command of Lieutenant Wilson, to Sierra Leone ; but on her way thither, either by a storm, or sudden gust of wind, she was sunk. But Lieutenant Wilson had time before she went down to make a raft out of the spars of the vessel ; on that raft he continued, with his unfortunate companions, drifting about for twenty days—existing—it could not be called living—upon the blood and flesh of sharks. This was the end of the *Felicidade* ; and, therefore, with respect to that vessel, no judicial condemnation ever took place. With respect to the *Echo*, there could be no doubt of her character, she having the slaves on board when taken ; and finding her in that state, her Majesty's ships were bound to take her.

These are the facts upon which the charge will be made that these men committed murder according to the English law. You will observe, gentlemen, that an Englishman, Thomas Palmer, lost his life by violence. The law of England is, that he who commits that violence is guilty of murder, unless he can show some reason why it should be reduced to some lower offence, or why the act itself should be justified. I will read to you a definition of murder, from Mr. Justice Forster, as given in the *Abridgment*, p. 255, "In every charge of murder, the fact of killing being first proved—and the fact of killing being proved without doubt (I will prove it by three witnesses, and the circumstances which marked the case)—in every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence adduced against him ; for the law assumeth the fact to be founded in malice, unless the contrary appeareth, and very right it is that the law should so assume. The defendant in this case standeth on the same footing as every other defendant doth. The matter which tended to justify or excuse it must appear in proof before he can be excused for it." I read that in full, in order that they may have the full benefit of the

doctrine laid down. The fact of having killed Mr. Palmer is proved by themselves—the proof must come from them, for not one of his companions was left alive to tell the tale. Would it be sufficient for them to say that it was their vessel? I will not anticipate that defence: but they were not in the *Echo*. Would it be sufficient for them to say they were in custody illegally; and that, being in custody illegally, they had a right to attempt her rescue—to attack and murder her crew in cold blood, when they were wholly unprepared for the assault, and had no right to anticipate it; for they being subjects of a country at peace and amity with us—no war going on at the time—had no right to take any private vengeance, if they had received a public wrong. And suppose for a moment that they were illegally in custody, I shall contend that they were not even in that case justified. But I will not rest my case on that. Gentlemen, between us and Brazil and Portugal there was a treaty which was duly ratified, and afterwards embodied in an Act of Parliament, 7 & 8 Geo. 4, c. 74. It is intituled “An Act to carry into execution a Convention between his Majesty and the Emperor of the Brazils, for the regulation and final abolition of the African Slave Trade.”

[The learned counsel read the preamble of the Act, the convention referred to in which was signed at Rio Janerio, Nov. 23, 1826.]

By this convention, the Brazilian government specially stipulated that it should not be lawful for its subjects to be engaged in or carrying on the African slave trade, and that the carrying of it on *shall be* deemed to be, and be *treated as piracy*. Here then, we have an Act of Parliament, which, in a British Court of Jurisprudence, I hold to be the best evidence of a convention—when you have the testimony of Parliament, consisting of her Majesty, and Lords and Commons, that there was such a convention, I hold that no other evidence of the existence of such a convention is required.

[The learned counsel then recited the clause of the Act which set forth the ratification of the convention—three years

after that time (long since passed) it was piracy in any Brazilian subject to be engaged or concerned in the carrying on of the African slave trade under any pretext or in any manner.]

However, that there may be no question about it, I have the original treaty signed by Don Pedro. I have the means of proving the seal to the treaty. Having thus fortified myself—having the proof in the Act of Parliament, but, for better caution, having the original treaty here, let us now see how these men can be excused in any manner whatever. They were committing piracy, and the man who commits piracy is in familiar language a robber of the sea, to be taken up as much upon the sea as any robber upon the land. Therefore these persons taken from the *Echo* and put on board the *Felicidade*, having come from the Brazils, their adopted country, wherever might have been the land of their birth—of course no better proof can be given of a man's being a subject of a certain state, than that he sails under its flag; we cannot go into the history of his early life, where he was born, and who brought him up. He comes from the Brazils, and therefore he is to be treated as its subject; and, therefore they were committing an act of piracy. And with respect to those on board the *Echo*, there can be no doubt about it, for slaves were found on board the vessel, and with respect to the one man who was on board the *Felicidade*, the proof is sufficiently strong; for there they had the slave deck, and all the means for carrying on the slave trade, in some way or other, or in some manner or other. Therefore, there can be no doubt that the crew of the *Felicidade* was just as liable to be seized as that of the *Echo* itself. It is due to you that I should bring before you this treaty, with satisfaction to you. They must have known that they were doing wrong, and that they were taken properly into custody. The very violence which they resorted to, proves this, in attacking every Englishman on board, who were merely taking them to have their offences adjudicated. If they had not done wrong, they would have been discharged on their arrival; but feeling that they had, they rose upon these Englishmen in the manner I have said.

Now I trust I have introduced this case to you, carefully avoiding any observations which would either extenuate or aggravate any of the facts to be proved by evidence against the prisoners. Having done so I shall lay before you this evidence ; and, by and by, when my learned friend has addressed you, I shall then address a few words to you, calling for your verdict for wilful murder, because of the act done by Majaval. It is of no matter by whom done, for they who were aiding and assisting were equally guilty. Therefore I shall apply this evidence to the indictment which now lies before you. I say, notwithstanding the very romantic circumstances which surround it, it seems to me a very simple case, for it seems to be this—there is the Englishman having a right to take the slave vessel, afterwards takes a second slave vessel ; he divides the crew, leaving a midshipman and a certain number of men with the vessel ; goes in search of the other in a boat ; while they in the vessel are off their guard, the people on board the first vessel rise and murder them. I say that that is the substance of the case. The facts on which the Crown rests are so few, and appear to me to be so very simple, that it is impossible that they could be taken to prove otherwise than murder.

Mr. Serjeant *Manning* objected to the introduction of the convention—but the learned Judge overruled the objection.

Lieutenant Robert Douglas Stupart, examined by Mr. *Cockburn*.—I am a lieutenant in the royal navy. I served in February last in the *Wasp*, under Captain Usherwood. She was employed in the Bight of Benin, near Lagos. On the 27th of February a strange sail was seen, and I was ordered in pursuit in one of the boats, to see what she was ;—she was a two-top sail schooner—if fitted for slaving, I was to detain her. The gig and cutter were on the same service. About eight at night we came up with the vessel, which was a Brazilian schooner, fitted for the slave trade ; with a slave deck over the cargo, made of loose planks.

By the JUDGE.—The distance between decks was about four feet.

She had more water than was necessary for her crew, and farina and flour. She had twenty-eight men, and Cuqueira was captain on board. I took possession in lat. 6, north of the equator. While in possession, the *Wasp* came up, and I received orders to keep company all night. The crew of this schooner, which was called the *Felicidade*, were sent aboard the *Wasp*. The schooner was then manned by fifteen English seamen. Six of the crew were sent back that night, but eventually Cuqueira, and Majaval, one of the prisoners, were only left on board. Next day I went on board with sixteen men, and Mr. Palmer; we had five cutlasses and two pistols. Soon after I was ordered by Captain Usherwood to keep a particular course, and did so. On the first of March I saw a brigantine to windward, which I chased, and came up with at 10 o'clock that night. I went alongside in the jolly boat, and the crew hailed us, and we said we were English; they then made sail and got away. We came up with her next day, and I ordered all sails to be lowered. I went on board next day and found her to be a Brazilian schooner with 430 slaves on board. She had often been seen by me before. Mr. Palmer first boarded her; he was in uniform. All but *Serva* knew me. *Serva's* nephew, *de Santos*, was acting as her commander when I boarded her at various previous times. She had a crew of twenty-eight. I had sixteen men when I had the two vessels. I first put Mr. Palmer on board the *Echo*, and gave him all the arms but one cutlass. Five cutlasses and two pistols were all the arms we had. I afterwards put him on board of the *Felicidade*, where each of his men had an iron bar, and one had a cutlass. I went on board of the *Echo*. I left James Mullens, Edward Marshall, James Mitchell, Thomas Barfoot, James Beynon, Gould, and two Kroomen; these were afterwards joined by Godding, with Mr. Palmer. I commenced feeding the slaves in the *Echo*; they were very much in want, of water particularly, and while doing so, I saw the *Felicidade* come towards us with Brazilian colours flying. I saw *Serva* and Cuqueira on board. She hailed to heave to, but I did

not, and she fired twice into us with grape, but no one was hurt. She then sheered off and sailed away. They were eight of the Echo's men on deck when she came up, but I sent them below. There were none of our men on the Felicidade's deck when she came up. I followed her but I did not come up with her. I gave the Echo up at Sierra Leone, to the mixed Commission Court, where the matter against her was investigated. I left my uniform, which was wet, my sextant, two or three books, and other things in the Felicidade, but I only saw one book afterwards, "*Herschell's Astronomy*," which was sent to me by Commodore Jones. I brought the document, now produced, home from the mixed Commission Court.

Cross-examined by Mr. Serjeant Manning.—When I took the Felicidade, she had no colours. It was between eight and nine at night when the Echo was taken. The crew could have seen our colours if they looked close.

By the JUDGE.—I do not think the colours could be easily seen.

By Mr. Collier.—The colours were in the jolly-boat, they were not flying any where else. The jolly boat was on deck ; it was behind the foremast. It could not be seen from the Echo if the sails were spread. The Wasp had printed instructions on board, but I took none on board the Felicidade. I knew she was fitted for the slave trade, because she had a slave deck. There is nothing peculiar about a slave deck, it consists merely of planks laid down temporarily over the hold. I know also, because she could not carry cargo enough to make it worth while to send her to that coast. These are my reasons for believing she was fitted for the slave trade.

The JUDGE.—He said he also formed his opinion from the quantity of water.

By the JUDGE.—The vessel was fit for nothing but slaving.

By Mr. Collier.—I cannot say that slaves had ever been on board.—She had been several times on shore ; on other voyages she had had slaves on board—that is to say, a vessel I believed to be her ; cannot swear it was the same. The men were re-

moved from the Echo to the Felicidade at night—four came in board with Mr. Palmer. I left fourteen of the Echo's men on the Felicidade when I left it in charge of Mr. Palmer. There was about three quarters of a mile distance between the Echo and Felicidade before the latter bore down upon us, which I think was three quarters of an hour. I don't know that any authority was shown to the captain of the Echo.

Re-examined.—She was boarded with the ensign on board, and we were in uniform, and Serva and his nephew knew who we were, and why the vessel was taken. I breakfasted with them next morning, and spoke about it. The conversation was a mixture of all languages, but Serva understood well why we took the Echo. The English colours were in the jolly boat, on board of the Felicidade, when she sailed away from us. We had often chased her before; to the best of my knowledge she was engaged in the slave trade.

By the JUDGE.—I never knew a slave deck used for the conveyance of merchandize. These decks are used to lay slaves on, they give an even floor. After the Echo's men came on board the Felicidade, the English flag was not flying from the jolly boat.

The Learned Judge now proceeded to read over his minutes of the evidence, which were interpreted to the prisoners by Mr. Bellamy, he having been previously sworn to do so with truth and fidelity.

After this had been done, the prisoner Alves stated that he saw no flag.

Lieutenant Stupart recalled, said that Mr. Palmer went on board the Felicidade at the same time that he went on board the Echo. He went on board in his uniform when he took the vessel. Mr. Palmer also had his uniform on when he went on board the Felicidade. Witness was obliged to take off his uniform, because it got wet, but he was seen in it by all the officers of the Echo. When he boarded the Echo for the last time, he had no uniform on, because he left it aboard the Felicidade to dry, and intended to go back to that vessel after

he had done what was necessary on board the *Echo*. All the men which were sent on board the *Echo* at first, with Mr. Palmer, remained on board that vessel, except Godding, who was sent aboard the *Felicidade*. There was no other shift of men afterwards. The seven men who were left on board the *Echo* when Mr. Palmer left, were in charge of the *Echo*, and the 430 slaves. I remained in charge of the *Echo* till the next day, when I fell in with the *Wasp*. Four prisoners from the *Echo* were sent on board the *Felicidade* with Mr. Palmer.

By a foreign Juror.—We were fifteen or sixteen miles from land when we boarded the *Felicidade*, and ten when we boarded the *Echo*. If I took the crews to Sierra Leone, they would have been landed and examined, but they would not have been punished. Their expenses even would have been paid them of their living at Sierra Leone.

On the remaining part of the evidence being interpreted, Majaval stated that Lieutenant Stupart came on board four times, without uniform, and that he did not know who he was.

Joaquim Antonio Cuqueira was now called. His evidence was taken through an interpreter. He said—I am an inhabitant of Bahia, where I was born, and have a wife and family. I am a seafaring man. I had the command of the *Felicidade*. I took the command in January; on the 2d she was fitted out for smuggling—contraband. I had no cargo out but water and provisions, and was to bring back slaves; she was fitted out to take in slaves; she had planks laid fore and aft the hold over the provisions and water, and a crew of 30. Majaval was the cook; I left Brazil on the 6th of January; I did not know Majaval till the day I sailed. I arrived on the African coast on the 6th or 7th of February. When I arrived off Lagos I saw the *Wasp*, but did not know it at that time by that name; when I saw it I tacked, and stood off the land. The English vessel chased on till dark, but did not catch us. I went away from Lagos for three or four days, to avoid that vessel, but then

came back again. When I returned, I saw the same vessel, and tacked and went to sea again; the English vessel chased, but did not come up with us. The English vessel then tacked and bore towards shore. We next saw the Star, and stood off to the north: we were to the southward of the Star; we stood off and got away; next day we anchored at Onin. Next morning, while at anchor, I believe we saw the Wasp, and we got under weigh and swept along shore, waiting for a boat that had gone on shore. The English vessel came towards us, she could not come up with us, but launched the launch and two boats, which chased us. They had English colours hoisted; the boats came alongside at seven at night. We did not resist, and I ordered the men to throw the muskets overboard, and give up possession. The launch first came up, and then the other boats, and the crews boarded us. As it was dark, I could not distinguish if Lieutenant Stupart came on board. All the crew of the Felicidade were ordered into the boats, except myself, and four more, but I was taken out about ten o'clock—but I had no watch and cannot tell exactly. All my crew were taken on board the Wasp. I was taken also on board of the Wasp, and remained there all night. I myself was brought back to the Felicidade by English sailors, in a boat. Majaval slept on board of the Felicidade that night. He is cook, and is considered as an officer. I meant all the crew were first taken on board the Wasp. When I was brought back to the Felicidade, there were the cook, steward, and first and third mates there, who had been there all night. The two mates and steward were then taken aboard the Wasp, and I and Majaval only remained. An officer of the Wasp was then in command of the Felicidade. When we parted from the Wasp, this officer in court (Lieutenant Stupart) came on board with the officer who is dead. They came to take charge of the vessel with some Englishmen. There were only two officers, and I think five white men and two Kroomen. Some more white men came on board afterwards. When Lieutenant Stupart came aboard, the boat was hoisted on deck, and we sailed

on all that day, and next day saw a brigantine. We did nothing but steer our course towards her. At night we came stern to stern with her. The officers hailed her to heave to, and sailed on. The officer jumped into a boat and chased her; that was Lieutenant Stupart, with five men. It was then about ten or eleven o'clock at night. The officer returned the same night to the Felicidade with the five men. Next morning we again saw the brigantine a great distance off. Betwixt five and six in the evening we came up to her, and the officer fired a gun for her to heave to, but they were chased and boarded in the evening by the young officer who is dead. The young officer came back next day, and brought twelve of the crew of the brigantine with him. All the prisoners now present, except Majaval, were then brought on board the Felicidade from the Echo. They were put down in the forecastle, with a man as sentry over them, except Serva and his brother-in-law, who remained in the Felicidade all night, and were taken back to the Echo next day. That night I had no conversation with the prisoners. Next morning Serva and his brother-in-law bade me good morning. Serva said, "Is there any coffee on board?" I said to him, "No, but I have tea." A boy was then sent by Serva for some coffee. I, Serva, Serva's brother-in-law, and Lieutenant Stupart, sat down to coffee. When the officer went away from the after part of the deck, where coffee was served, he went below, and I, Serva, and Serva's brother-in-law, remained. Serva said to me, "We have something here to do. I have four men I can put confidence in, to kill all the Englishmen, throw them overboard, and then to take the brigantine with the schooner." I answered to him, "Don't you recollect you are among English cruisers, crossing to and fro; that a steamer is cruising and likewise the Star?" Serva said, "You are a man in want and void of sense."

[The interpreter here said he could not exactly translate the word he had given as sense, but on speaking to witness, he said it meant spirit—the word was *animu*.]

Serva said to me, "I have four men I can put confidence

in ; part of the English are drunk." I then said, "Do you know you are among the cruisers ; the Star, the steamer, and others?" Serva then again said, "You are a man wanting spirit." I said to him, "If you do not give over those words, I shall make it known to the officers." Serva replied, "He would not do anything of the kind, or speak of it." The Lieutenant then went into the boat, and Serva's brother-in-law went with him, and they went on board the Echo. Three Englishmen, two Kroomen, and the quarter-master were now on deck. The officer who is not here, came back with one Englishman and seven other people in the boat. The officer who is dead is the one who came on board ; I heard him called Mr. Palmer. The officer went and bathed himself, and let the boat with the seven men in her drop astern of the schooner, by which she was towed. The young officer then sat down abaft, and was wiping himself. One Englishman was at the helm ; I do not know his name : another was stationed forward ; another was lying down forward ; another was in midships ; and one was sentry alongside the hatchway. Three were asleep, and one of these was very tipsy. The sentry by the hatchway was one of those asleep. The quarter-master was talking to Mr. Palmer. There were two Kroomen on deck belonging to the Wasp. At that time Serva went to the hatchway, and called the men to come up and commit murder. I caught Serva by the hand ; I went from aft over to him, when I saw him at the hatchway, I said to him "don't you be foolish." Serva was still calling the men to come up, Serva said, "come up here, men, come up." When I saw them coming up, I made a sign to the quarter-master and officer. The quarter-master then caught a bar of iron, struck prisoner Alves on the head, caught him up and threw him overboard. Alves fell on the starboard side of the deck. The quarter-master struck at him as he was coming up the hatchway with a knife in his hand, it was a knife with a white handle and long blade. All of them had knives. They could only come up the hatchway two at a time, and Alves was first. Alves

got on deck, when he was struck down. The quarter-master caught hold of a handspike after this, and began to defend himself from the prisoners who came on deck, except two or three who said they were poorly. Antonio Joaquim, Sebastian de Santos, and Joze Antonio were on deck when Alves was struck. De Santos, and Joze Antonio had no knives in their hands when the prisoner Alves was struck, but they had knives in their belts. These two did not come up from the hatchway, they were lying on the deck. Antonio Joaquim was also on deck. The other two complained of being poorly, but he did not.

[Mr. Duval, one of the jurors, here asked the Judge that each of the jurors should be provided with a list of the prisoners, which he ordered to be done.]

The other men then came up with their knives and set upon the quarter-master. Four or five came up, but Majaval was not one of them. Majaval ran up when called by Serva. The men who came from the hatchway were Alves, Florenzo, Ribiero, Juan Francisco, and Jose Maria Martinos. All these three had knives. As soon as they came up they fell aboard the quarter-master. He defended himself with a handspike. He struck Ribiero, Francisco and Martinos with the handspike, while they were sticking and stabbing him with their knives. The boatswain wounded Alves with a bar of iron, but he threw that away, and wounded the other three with a handspike. All the while they were sticking and cutting them with their knives. At this time Serva called the people out of the boat astern. Majaval now came out of the cabin, where he had been making bread, with a long cooking knife in his hand, and went and ran the young officer through the side. He then caught hold of his feet and threw him overboard. After that Majaval went to assist the others who were forward. One of the sailors who was asleep, was killed by one of the crew, who stabbed him in the breast. This man killed himself after he was captured by the Star. Majaval then went forward, and all were cutting and slaying together. One of the Englishmen was thrown partly overboard, and hung by the

side of the vessel—this was the sentry ; he had caught hold of the fore-sheet and held to it ; Antonio Joaquim then went to him and cut his fingers off, and he sank into the water and disappeared. Others of the crew had beaten him over the head. The quartermaster was killed and thrown overboard. The two Kroomen jumped overboard, and I cannot tell what became of them. Serva was standing on deck saying, “ Kill ’em, kill ’em, throw ’em overboard.” After all were killed and thrown overboard, Serva gave orders to lower the peak of the mainsail, as a signal to his brother-in-law to rise and kill all the English on board the brigantine. Serva took command of the Felicidade, and gave orders to hoist the Brazilian flag, which was done, and to chase the brigantine. We came up with the brigantine, the guns having been shifted ready to fire, and all hands stood behind me, and Serva ordered me to fire. I elevated the gun, but another fired it. Serva ordered me to elevate the gun. Serva then ordered me to hail the brigantine to heave to, and he called to his brother-in-law that all the English were dead. I hailed by his orders in Portuguese, and told them all the English were dead. I saw Lieutenant Stupart and Serva’s brother-in-law on board the Echo. The schooner then sailed on, and fired another gun into the bows of the brigantine. Serva gave the order. When Serva found the brigantine did not heave to, he ordered the schooner to be put about, and sailed away. Serva said that as he had taken the Felicidade from the Englishmen she was his. When we sailed from the Echo, the decks were covered with blood, which it took an hour to wash off. I asked Serva where he was bound, and he said, “ I am going to Rio Janeiro, as it is my vessel taken out of the Englishmen’s hands.” Serva also said to me, “ You have allowed yourself to be taken with two boats and a launch, when you had thirty men, and I with my four cats have taken her from them again. It is now my vessel, and I am going to take her to my owners at Rio Janeiro, instead of the brigantine ; I have lost a great deal of money in the brigantine, and I shall take this vessel instead.” I answered,

"I hope you will put me on board the first vessel you meet, as I would rather pay my passage, than remain on board, or put me on the first land."

Four days after we were fell in with by the *Star*, which took possession of the *Felicidade*. When the *Star* was in chase, *Serva* gave orders to luff and keep away. When he found we could not escape, he began to get drinking rum and wine. Two musket shots and a cannon were fired by the *Star*, to make us heave to, and then she lowered her boats and took possession. All on board stowed themselves away except *Serva*, (who was drunk on deck), and the man at the helm. All on board the *Felicidade* were ultimately taken on board the *Star*. *Serva* asked me to say he was a passenger. The other seamen said the vessel was named the *Virginia*, and *Serva* asked me do the same. I spoke to the captain of the *Star* in about four days after we were taken. The reason I told the commander was, that I saw he was kind and free, and I thought an unjust crime had been committed on board the *Felicidade*. I did not mention it for four days because I stood in fear.

Cross-examined by Mr. Serjeant Manning.—I am forty-five years old. I first went to sea in 1817. I cannot tell how many voyages I have made to Africa since that time. Sometimes I have made two or three voyages in the year; sometimes none. *Serva*, I, and his brother-in-law, were all sitting together when he first spoke of rising on the *Englishmen*. After this I sometimes walked about, and sometimes sat down. It was three quarters of an hour or an hour after this conversation that *Alves* came up on deck. After the breakfast, Lieutenant *Stupart* and *Serva*'s brother-in-law went on board the *Echo*. After *Serva* had called down the hatchway, *Alves* came up. In about ten minutes after, *Serva* called the men to come up. I had hold of *Serva*'s hand, which caused some delay. As soon as I had let go *Serva*'s hand, I made a motion to the quartermaster with my hand to come. I am sure he saw me. He was about thirteen or fourteen feet from the hatch-

way. I beckoned to him with one hand, and with the other pointed to the hatchway. I gave no sign at that time to the other English sailor. I made no other sign to the quartermaster but what I have stated. We fell in with the Star, and were taken prisoners four or five days after. I first spoke to the commander of the Star. He asked me questions, and I answered them. The only conversation that took place between me and an officer of the Star, was when we were boarded, and an officer asked me who was the captain. I said the captain was left on shore, because Serva asked me to say so, and I was afraid at the moment. I was afraid that they might then be put an end to. I was afraid we might be murdered, because the crime committed was no play. I was afraid of the officers, seamen, and Kroomen. I said that the captain was put on shore, because I knew I had no papers, as the Wasp had taken them away, and because a murder had been committed on board the Felicidade. All said that the captain was on shore; they thought it might be a saving to them. I was concealed in the after-peak of the vessel, between sacks of rice, when the Felicidade was boarded. I hid myself, because sometimes when English sailors board, they cut away with their cutlasses, at times, on unarmed men. I have been eighteen to twenty years in this trade. I have known English sailors cut unarmed men with their cutlasses. The man at the helm of the Felicidade received two cuts when she was boarded from the Star. There was no resistance made; it was a sailor who gave the cuts, not an officer. When the sailors are tired with pulling all day they get angry. I can't say what officer came on board the vessel at the time, as it was dark. The man let go the helm to hand a rope over the vessel's side, and as he did so, got two cuts on the arm from the cutlass of a seaman in the boat. I stood at the companion when the man went to the side. The cutlasses did not cut, the blows were given with the flat of it. Knowing this was why I concealed myself.

About four days after I got on board the Star, I mentioned the matter. I was waiting to see if the officers were kind and

obliging, or rash, as I was on board when this happened, and as the commander who fetched us home here said, if he had fallen in with us, we would never have come to England alive. I was afraid. This was the captain of the vessel which brought us home, who said this. I was in fear. The reason I said nothing for four days was, that I might know the disposition of the officers. What man in this world would be without fear when he knew he was on board a vessel where such a murder had been committed? When I was taken on board the *Star*, the officers often spoke to me, and from that I knew they were kind. I said that I was captain of the *Felicidade* before the murder took place. I told this to an officer on board the *Star*. When the officer boarded the *Felicidade*, I did not state what situation I had been in on board the *Felicidade*. I said I was a passenger at first, after I first went on board the *Star*. I did not then say anything about the crew. When I first went on board I said we were all a new ship's company, and that the captain was on shore to look for men. I could not call these lies, I admit they were stories—a man who lied would always stick to the lie. What man would be able to speak and state what had happened at that time?

By *Mr. Collier*.—I do not know that if my evidence convicts the prisoners, none of them can bear witness against me. I do not know that if they are acquitted they may hang me. What I have stated is true.

I wish to convict no one. If I have told a lie, I will suffer my head to be cut off. I am afraid of no one. *Serva* is the instigator of all that has happened. The evidence I give now, I have sworn on my soul to the Almighty. I did not swear when I made my statement to the officers. I swear to the truth. I am under no fear, and only wish to speak the truth. I never had a dispute with *Serva*, or a quarrel about the vessel; when he said it was his, I asked him to land me. I could distinguish the flags when the English boats came alongside, and I saw they were English flags, because

the boats were pulling after us all day, and had them hoisted. I could not distinguish the officer, it was too dark. I never intended to fire on the English, or I would not have thrown the muskets and powder overboard. I knew I should be tried for my life for murdering and maiming them. I never said I would not fire, because the English were well armed. I had thirty men, three guns, short muskets, cutlasses and other arms.

Mr. *Collier* now applied to have part of this witness's depositions before the magistrates read, in order to cross-examine upon it.

The Learned JUDGE directed this to be done, and the part alluded to was read, and was to the effect that he checked his men from firing on the boats, as he could see the boats well armed, and for that reason ordered the men not to fire.

Witness.—My answer to the magistrates at my examination was, that I could not see whether the boats were well armed till they came alongside. I would not allow my men to fire, and I ordered the arms to be thrown overboard before the boats came up, and before I knew they were well armed. An Englishman came with Mr. Palmer when he last came on board the *Felicidade*. There were twenty-two persons, without the English, on board the *Felicidade*, and in the boat astern, when the murder began. The conversation between me, *Serva*, and his brother-in-law, was about seven o'clock. I had no conversation with *Serva* at night. When *Serva* proposed to kill the English, I said, "Are you not aware of the cruizers; you are going to do a barbarous case."

[The Secretary to the Brazilian Legation, who sat under the interpreter, here remarked that a word had been misinterpreted.

The interpreter complained of the interruption, said he was correct, and requested that the Secretary should be sworn.

The Jury also complained that this was the third time he had interrupted the Interpreter.

Mr. *Collier* said he wished to have examined the Secretary

on oath, but he had expressed a strong disinclination to be sworn, being deputed to watch the proceedings only, and on no account to take any part in them.

The JUDGE said he did not care who he was, he would not have the proceedings interrupted. He did not understand why he claimed a privilege of not being sworn—a sovereign should not be examined in that Court without being sworn].

Cross-examination continued.—In coming up from the hatchway one man came first, then two, and then one. There was a bulwark to the Felicidade. Alves was knocked overboard the moment he came on deck, before Mr. Palmer was struck. Alves swam round the vessel and caught hold of the boat, and got into it. He remained in the boat till it was all over. He then came on board, and took the blood in his hands off the deck, and drank it, because he had not his satisfaction. I mentioned this about the blood on the second day of the examination, before the magistrates, because I forgot it the first day. It was not an after-thought, because the evidence was not strong enough against Alves. While the quartermaster was fighting, the midshipman was running about the deck with his hands to his head. He ran to me, and said, "Captain, what is this?" I went to the helm, and while there Majaval came up with a knife, and I was in fear, and was not going to run against him. The affray lasted about half an hour, or three quarters of an hour. I never said it was an hour and a half. I concealed myself on board the Felicidade when the English came on board, because I was afraid of the cutlasses. I was about an hour before I came up. I came up myself. Knowing that there were others on board, I told of the murder, because I was innocent. I was brought home with Rosaigre and Soberino, but we were separated from each other. In the steamer I and these two were together; I was in irons in the brig that brought me home; I had no conversation with the other two about this—it was not a fit subject for conversation.

[The deposition was again referred to, where the words

were "all the ten prisoners were on deck killing the English." The witness having in the present instance stated that Alves had been thrown overboard, and remained in the boat—he was now questioned as to this discrepancy.]

All the ten prisoners were on deck killing the English. All that were in the vessel were assisting in killing. Alves was then in the boat.

By the JUDGE.—How could there be ten killing the English, if he was in the boat? There were ten still on deck.

The JUDGE.—How could the ten prisoners be attacking the English, when one was in the boat? I mean that the ten prisoners were all on deck at once, and all engaged in murdering.

By Mr. *Collier*.—When before the magistrates, I said there were ten engaged in murdering one man, nine of them are now here. I never said there were more than ten on deck. One of the ten I allude to, is since dead. I was at the helm till the murder was over, and Serva then came and ordered me to get ready to fire. I did not see Alves swim round to the boat.

[The deposition was again referred to, for the words, "who swam round the vessel to the boat at the stern, laid hold of the boat, remained there for a minute or two, and then came on board, and the affray was over."]

Cross-examination resumed.—The statement is correct. I did not see Alves swim.

Emanuel Francois Rosaigre (a black), who spoke French, examined by Mr. *Poulden*.—I am a native of Pondicherry, twenty-seven years old. I know prisoner Serva. I knew him first at Rio Janeiro, and afterwards on the voyage. I have known him about two years. I became his servant at Rio, eighteen months ago. I lived in his service first in his house at Rio, about two months before I sailed. At the end of the two months I went on board the *Echo*. The captain was Serva's nephew; he was called Jozé. Serva took command of the *Echo* in Africa, to discharge the cargo, at Onin (Lagos).

The cargo was various, in bales and cases, some of which contained prints and calicoes. I joined the vessel when she was loaded at Rio. There was a crew of fourteen, not counting Serva or myself. There were ten passengers on board. In the crew were the prisoners Alves, Joaquim, Manuel Antonio, Riberio, Francisco, and Jozé Antonio, when we left Rio. De Santos and Martinos were not of the crew then; they came on board at Onin. When we left Rio we were to go to St. Thomas'; we saw Cape Palmas first, but did not land till we reached Goa, where we landed five passengers, blacks, and then sailed for Onin. We fell in with the *Wasp* on our way to Onin. Lieutenant Stupart boarded us, and the ship's papers were produced. He permitted us to pass. We anchored at Lagos. The cargo was sent on shore under the orders of Serva. We remained at Onin sixty days. Lieutenant Stupart and other officers visited us several times. Lieutenant Stupart searched the *Echo*. Before we left, blacks were taken on board, and slave provisions, water and wood. There were a great many slaves. I have heard 435, but did not count them. We then made away for Brazil, under Serva's command. Next morning another vessel was seen, and we altered our way. Three days after we left Onin, we were boarded by a two-topsail schooner, which some called the *Virgine*, and some the *Felicidade*. We had flags on board the *Echo*, but did not hoist them—they were Brazilian flags. An officer came on board, but it was night and raining, and he could not distinguish; it was from ten to eleven. He came in a boat with armed men. Next morning I was taken out of the *Echo*, about eight o'clock, with six more, and two Englishmen. We went alongside the schooner, and the Englishmen got out, and the boat was dropped astern and towed there. About three-quarters of an hour after I heard a noise in the schooner, and saw two blacks swimming in the water. I saw two white people, who disappeared in a moment, and there was blood all in the water. The noise lasted half an hour good, or three-quarters of an

hour. I heard a voice say, "Kill, kill," in Portuguese." "*Mata mata,*" were the words. I heard Serva say, "*Kill, kill,*" I believe, but could not swear. Serva called to us to come on deck, as there was nothing more to fear. We then went on board; I saw all the prisoners now in Court after I got on board. Alves was on deck, and Francisco, Joaquim, and Riberio; they were all four covered with blood, on the head. I saw Martinos on board soon after I got on deck. He was wounded in the side, which they were dressing with a bandage. There were several detached stains of blood on the deck, it had been spilled in several places, and trodden about with the feet, so as to make several stains or foot marks. Serva was on board, and gave the principal orders; Manuel Antonio was at the helm, and Serva ordered him to steer for the brigantine. We went alongside the Echo, and a shot was fired from the Felicidade, a second shot was fired as we crossed her bows, Serva called out to the brigantine, "Jozé, throw yourself into the sea." Then Serva and others called out that there was no fear, as there was no English on board. We had Brazilian colours hoisted, which I knew from their being hauled down when I saw them folded up. After firing into the Echo, we sailed away. A few days after, Serva said to me, "You will arrive at Rio before you expect it." Cuquiera was on board. I heard Cuqueira say to Serva, "I will take the vessel to my own rat Bahia." Serva said, "No, I shall take her to Santos, because my owner has lost some reis, (money,) a hundred and eighty-four thousand francs, and I shall take her to my owner for the loss of my slaves." Santos is to the south of Rio Janeiro. Cuqueira then said, "If that is the case, take charge of the vessel, and whatever vessel you fall in with, put me on board, or land me on the first land you see." On the third day, we fell in with the Star, and I went below and stowed myself away. Before I went below, I saw Serva drinking brandy. I was at last taken on board the Star.

Cross-examined by Mr. Serjeant Manning.—When the noise was over on board the Felicidade, I went out of the boat;

and got on board. Manuel Antonio was then at the helm, and remained there some time—till dinner-time. I cannot tell who then took the helm. I heard the conversation between Serva and Cuqueira about the ship on the next day. I do not know who commenced it. They did not appear to dispute or be angry about the vessel. In five hours after we were boarded, we were shipped into the Star. Serva and Cuqueira were taken on board the Star with me, at seven in the morning, and in the afternoon of the same day, Serva was put abaft as the captain. I was in the lazaretto of the vessel when we were boarded.

By Mr. *Collier*.—When I went on board the *Felicidade*, there were spots of blood on Majaval's trousers. The crew had knives in their waistbands, but Majaval had no knife. One of the crew, who is not here, was wiping a bloody knife.

By Mr. *Duval*, a juror.—When the boat was four or five fathoms astern, and the bulwark low, how could you not see the deck, or those on it? The height of the stern frame prevented me, I could not reach the top of it with my hand.

By the JUDGE.—What is the height from the deck? About three feet, from where the helmsman stands.

By Mr. *Duval*.—When I heard the conversation between Serva and Cuqueira, I sat close by them. I was passing by them, but I stopped to hear them. I was passing by chance that way. I did not see Alves swim to the boat. I was not curious to see what was going on, when I heard the noise in the schooner. I did not get up to see. I was sitting at the bottom of the boat, when I heard the words "kill, kill;" it gave me a turn, and I then saw the bodies in the water. I can understand Portuguese when spoken by Portuguese, but not well. I cannot write or read Portuguese or English, so I say I do not understand them perfectly.

[*Another Juror* now requested that the interpreter should put a phrase to witness in Portuguese,—“Come up, there is no danger,” and see if he could translate it into French.]

The JUDGE, however, reversed it, and had the phrase put in

French, to be translated into Portuguese, which was accurately done by witness.

By the JUDGE.—The rudder is guided by a tiller, and the helmsman stands at the end of the tiller farthest from the rudder. I did not see Alves in the water. There was only one boat attached to the vessel. I understand a little English, but I understand the Portuguese better, and French best. When I went on board, Alves stood by the main hatchway. I did not observe his dress. He was going to wash himself. Riberio was on deck. If any one came into the boat when I was in it, I must have seen him. Three whites went out of it first, and three blacks afterwards—the whites were Portuguese. None of the prisoners here were among them. I did not see Alves climb the painter, but I cannot say he did not. I did not see Alves's head next day, nor did I see how the direction of the cut was. I never conversed with Cuqueira about this. I did not notice the clothes of Alves, whether they were wet or dry.

By Mr. *Godson*.—While I lived in Serva's family, they spoke in Portuguese, and I understood them.

PLATT, B.—Did the quarter-master strike in his own defence? He did.—If he had not struck would he inevitably have been wounded? He would.—Were others rushing up behind Alves with daggers in their hands? They were.—Must the quarter-master have seen them? He must.—Did he fight to save his own life? He did.

Soberino da Costa was then called.—He was examined by Mr. Serjeant *Manning*, as to his fitness to be sworn as a witness.—I am a native of Ooah, in Africa. I lived some time there, and was sold as a slave. I am a Christian, and baptized.

By Mr. *Godson*.—I was born in the interior of Africa, and was free there, but I was taken and sold as a slave when a little lad, and sent to Bahia, where I was a slave to Juan de Costa. In the beginning of this year I went in a ship to the African coast—in a French bark, with a French captain. In Africa I went on board the vessel that was taken. I was in a brigantine where the prisoners were—I was a barber on

board. When the vessel was taken, I was in the fore-castle, and as there were slaves on board, I got in among them when the boats boarded us. I myself afterwards came on deck from among the slaves. I was taken in the night to the Felicidade. In the morning all the prisoners, except Majaval and Serva, were in the fore-castle with me in the Felicidade. They were José Alves, Ribeiro, Francisco, Martinos, Joaquim de Santos, and the two Antonios. I did not see Cuqueira till all the noise was over. While we were in the fore-castle Majaval came three times to the hatchway. He called down, "Get ready to kill the English sailors," each time that he came. I heard Alves and Francisco speak to others in the fore-castle. They said, "Let us rise." They were getting ready their knives. They said to me, "Get ready, or we will kill you as well." Ribeiro said, "No." I said, "Leave those things alone, for we shall be taken by the English cruisers." Ribeiro said, "Listen to the black man, hear what he says, it is a sad case." The others said, "You are a fearful person and a coward," to Ribeiro. They kept talking to Ribeiro, at last he said, "When you are ready, I will go." Francisco spoke, and said to me, "If you don't go, I will kill you with a knife." He then gave me a knife. I said then, "If that is the case, when you go I will go too." All the sailors had knives. They put their knives in their belts, and then took their shirts out and dropped them over their knives, to hide them away. Serva came to the hatchway, and said, "Get ready." He came a second time, and said, "Come up." They went up, all of them, the instant Serva called to them.

Manning, Serjt., here objected that the interpreter had not put the question accurately, but the interpreter said he had.

Examination resumed.—I remained below while they went up, because I was afraid of being killed. After they had gone up I heard their feet—a sound of feet on deck. I saw Ribeiro come down with his head broken. He gave me a bag to take a shirt from to tie round his head. I went on deck after awhile, and I saw blood there. All the prisoners

were on deck except Ribeiro. There was not one Englishman on deck. There were Englishmen on board when I was brought on board the night before. Englishmen put us below, and put a sentry over the main hatchway. I saw the sentry at the hatchway in the morning, and the prisoners were asking him to let them come up one by one to smoke ; and he allowed them to come up one by one and light their cigars. There was blood on the deck when I came up. The crew were heaving the Englishmen's clothes overboard. Alvez, Martinez, and Francisco were wounded in the head.

Serva was walking the decks, and I heard him say, " Fire upon the brigantine." He said, also, " Heave all the clothes overboard." Clothes, hats, buttons, and thread were thrown overboard. After firing, we sailed away, I heard them say, " to Rio Janeiro." A flag was hoisted—it appeared like a Brazilian flag. When we were sailing, Captain Serva gave orders. He had a book, and said, " I do not understand direct to steer by this book." The vessel was taken by the Star on the fifth day after the murder.

Cross-examined by Manning, Serjt.—Three days after I was taken on board the Star, I stated what had taken place. I did not tell before, because no one there could understand my language. A relation of mine who could speak the language, interpreted for me from my own language. I told him to make it known to commander, from the crime those people had committed. He was a Krooman (African) sailor from Sierra Leone, aboard the Star. We were boarded by the Star at night, but I cannot tell the hour ; it was past midnight, I was below, stowed away when we were boarded. I concealed myself for fear they might kill me, or do any harm to me for the things that had been transacted. Not very long after we were boarded, I was taken aboard the Star before sunrise. Three days after I got on board the Star, I told my relation what had been done, it was near twelve o'clock ; the captain not understanding me, sent for my relation, I told him, and he told it to the commander. That was the first day I saw my relation to know

him. I went on the deck of the Felicidade some time, I cannot say how long, after the others. It was after all the noise was over, a little while after. This was about ten o'clock or half past, as far as I know. I went forward when I came up, and did not see who was at the helm. Cuqueira was walking the deck.

By Mr. *Collier*.—I have been baptized a long time; I know what the Bible is; I cannot read, but I know there is books belonging to the Almighty in regard of religion. Those books are books who is made holy for the church in regard of religion. The only name I heard of them in Bahia was books of the Almighty, which the parsons have got. I know there is one book of the Almighty given to people to swear by, and if they do not tell true they go to Hell. This is the only book I know of belonging to the Almighty, for there is but one God; but there are other books of a different sense. Rosaigre was not on board that I saw when I came out of the hatchway, nor do I recollect seeing him that day. A good while before I went on deck, Ribeiro came below; he came before the noise was over. Serva gave the order to brace the yards, when the Star was in chase of us. I did not see who fired the gun at the Star.

Re-examined.—If I speak true I go to the Almighty, if not I go to Hell.

By a *Juror*.—I had no conversation with Ribeiro when he came below. I gave him a bag to take a shirt from to tie round his head. Ribeiro made a complaining noise when he came below. I was in confinement the first three days I was on board the Star. We were on the fore-top-gallant fore-castle on deck, and were not allowed to leave it. I spoke to the commander after I had been in confinement three days.

By the JUDGE.—I did not know who was the commander before that time.

By a *Juror*.—I saw Kroomen on board during the three days, from eight to ten. I had no opportunity to speak to

them, because I was in confinement all the time. The sentry would not allow me to speak to any one ; but I had a wish to speak. I did not try to make the sentry understand me ; I had no conversation with the prisoners on those days ; I might, but I am vexed. I did not speak to neither of them ; Rosaigre and Cuqueira were with me, and were fellow-prisoners. I could have spoken to them if I had a mind ; but I did not at any time do so.

By Mr. *Collier*.—I did not see Ribeiro come up from the fore-castle at all that day, after he went down wounded.

Thomas Lethbridge.—I am corporal of the marines, and in March was aboard the *Star*. On the 6th we were returning from Prince's Island to Lagos, and fell in with a vessel, which we chased. We came up at four in the morning, and I went aboard with Lieutenant Etheridge and some men ; she was the *Felicidade*. When we went on board there was no one on deck ; the crew were concealed below. All the prisoners were on board, and Cuqueira, Rosaigre, and Sobrino. There were others on board. The crew called the vessel the *Virginia*. I searched for papers, and found in the after-cabin a volume of the Cabinet Cyclopædia on Astronomy, with the name " R. D. Stupart." The book produced is the same. I found some duck bags, such as are used in her Majesty's service, containing flannel, duck, and serge, such as are used in the service. I found also a pair of hammock clews, and a fishing line, with the Government mark in it, a blue serge shirt, marked 40, a ship's number. On going below, I found several stains of blood on the slave deck. There was a boat's anchor there marked with the broad arrow, and also a boat's awning stanchion, and a hand lead and line (he produced the clews, fishing line, one of the bags, and the shirt.) I showed the anchor to Thomas Wood. Prisoners were removed on board the *Star*. Ribeiro, Francisco, Alvez, and Martinez were wounded on the forehead ; their heads were tied up. They said a spar had fallen and wounded them.

Cross-examined by Manning, Serjt.—The wounds appeared

to have been the "seventh cut" of a sabre. The wounds were nearly alike. They all seemed to have been made by a sharp cutting instrument.

By Mr. *Collier*.—There were eight other men ; six were discharged by the commander, after evidence.

By the *Judge*.—I saw no bruise on their heads. The hair was not cut off, and there did not seem to be any swelling. They appeared to be clean cut by some sharp instrument.

By a *Juror*.—A handspike is made of wood, four or five feet long. I do not believe the wounds were inflicted by a handspike. The wounds might have been inflicted by a bar of iron. A handspike is square at one end.

By a *Juror*.—Are not handspikes made of ash or oak ? I cannot say. Those wounds might have been inflicted by the sharp edge of a bar of iron. Any large cutting instrument, or a bar of iron would have made the cuts. I do not think the stanchion produced before the magistrates could have inflicted the wounds, because it was covered with canvass. The wounds did not appear to have been inflicted above a day or two.

[This evidence having been given in English, was now interpreted to the prisoners.]

Thomas Wood, seaman of the *Wasp*.—In February I was on board the *Wasp*, when she fell in with the *Felicidade*. I went on board when we fell in with the *Echo*. I was sent on board the *Echo* in the *Wasp's* boat under Lieutenant Stupart. Mr. Palmer was with me in his uniform jacket. The red ensign was hoisted in the boat by me before I went to the *Echo*, and when she hove in sight. It was up when we went on board the *Echo*. I remained on board the *Echo*, Mr. Palmer went on board the *Felicidade* the next day, and Lieutenant Stupart came back. Seamen are known by numbers ; I was fifty-two, number forty was Thomas Barfoot, and he was sent on board the *Felicidade*. The shirt now produced is marked forty. The flannel produced is marked in the same way ; I left Barfoot on board the *Felicidade*. I know Majaval and Cuqueira—they were aboard the *Felicidade*.

Cross-examination.—A uniform jacket has crown and anchor buttons. It was dark when we boarded; Mr. Palmer was a midshipman. We had the ensign up. A midshipman's uniform jacket has these buttons, and a white patch on it, which the seamen's jackets have not. The gun of the *Felicidade* was fired by Cuqueira; he took the piece of lighted wood from Majaval's hand to fire it. Mr. Palmer assumed authority over the *Echo* when he went on board. He gave directions for the steering. Lieutenant Stupart gave him orders to remove the *Echo's* crew to the *Felicidade*. Cuqueira pointed the cannon before he fired it.

This evidence was also interpreted to the prisoners.

Lieutenant John Wilson, R. N.—In the month of March, I belonged to the *Star*, Commander Dunlop, which was employed in the suppression of the slave trade. We were cruising on the African coast. On the 6th we chased a vessel, which proved to be the *Felicidade*. I boarded her to take her to Sierra Leone. On the 16th, we encountered a squall, and the vessel was capsized. We made a raft, and remained on it twenty days, during which five died. The *Cygnets* picked us up, and took us to the *Wasp* from which we were brought home by the *Rapid*. There were doubloons and other foreign money on board, in belts, one of which was saturated with blood. There was some English money loose.

Cross-examined by Manning, Serjt.—The belts were in my possession till the vessel went down.

Lieutenant Stupart recalled.—I left one man on board the *Felicidade*, armed with a cutlass, and the others with bars of iron, two of them were flat bars, and one of them an awning stanchion four feet long, there was also a piece of hard heavy wood, with very sharp edges. The stanchion was square at at one end, which was not covered with canvass, the rest was. One of the Kroomen had a large heavy axe. Mr. Palmer acted under my orders, when he went on board the *Echo*, every thing was done by my orders. Mr. Palmer brought part of the *Echo's* crew on board the *Felicidade* by my orders.

Cross-examined by Manning, Serjt.—I saw the stanchion produced at Plymouth. One end of it was not covered. I did not see the crews of the Echo or Felicidade searched. I was not in a position to see whether they had knives. I did not consider it my duty to search the men before I sent them to the Wasp. It was my duty to have searched the men that were sent on board the Felicidade, and I desired the quartermaster to feel their waists where they usually keep their knives, and he did so to the best of my belief. When I was on board the Echo, and saw the Felicidade first bearing down on us, I could not accurately distinguish those on board. I should think the wounds on the head might have been inflicted by some of the flat pieces of iron that were on board, or the piece of wood. It was Mr. Palmer's duty to have disarmed the crew of the Echo as soon as he went on board.

Lewis Hertslett.—I am keeper of the state papers in the foreign office. I produce the last treaty with the Brazil, and the Emperor's ratification. I have been in the office forty-three years. I know the seal of Brazil, and have seen it acted on. The seal now produced is that of the Emperor of Brazil; I have received the signature of Don Pedro, to documents which have been officially acted on. The signature to this ratification is his. [He then read the first article which declared slave dealing to be piracy.] The treaty was dated in 1826.

Cuqueira, recalled.—I saw the quartermaster strike Alvez with the stanchion, produced at Plymouth. He struck, holding it in both hands. He held by the round part, and struck with the square part.

The interpreter, after some discussion on a sentence in the evidence of Cuqueira, was recalled to state whether he had used the particular sentence: witness denied that he had used it, and

Manning, Serjt., said he would call a witness to prove he had.

By a *Juror.*—When Serva went to the hatchway to call these

men to come up, was there an English sentry there? "The sentry was laid down by it asleep."

Saw José Antonio do nothing—he saw nothing in his hand. He did not see him lay hands on any body. He saw no knife in the hand of Manuel Antonio; he saw knives only in the hands of the first four that came up. After it was over he saw a knife in the waistband of Manuel Antonio; but he saw no blood either on the knife or the clothes of Manuel. He saw no blood on the clothes of José Antonio; he looked rather poorly while this "transaction" was going on. He saw him lying on the forecastle, just before it took place—that was the time he looked poorly. They had permission from the sentry to come up one by one to smoke their cigars, and he was allowed to remain, being poorly. He did not see him get up from the forecastle.

Saw Sebastian de Santos do nothing. He was on deck forward, lying down. He had complained to witness of being poorly before during that night. He could not say whether he had permission from the sentry to stay, but he had leave to come up and smoke. He did not see him get up. He did not see Sebastian do anything, or any blood upon his clothes. In reply to another question, he said he believed the sentry had been asleep half an hour before the men came up the hatchway. He saw no man come up to smoke whilst the sentry was asleep.

This was the case for the prosecution.

The counsel for the prisoners here submitted that there was no case to go to the jury. The Felicidade was unlawfully captured, and in contravention of Articles 5 and 6 of the treaty between England and Portugal of 1817, recited in 5 Geo. 4, c. 118, and adopted in the convention with Brazil of 1826, recited in 7 & 8 Geo. 4, c. 74, and Article 1 of the instructions annexed to the treaty, because she had no slaves on board. That the Echo was unlawfully captured, and in contravention of Article 7 of the treaty, because she was not cap-

tured by a vessel of the British navy, provided with special instructions, and in contravention of Article 9 of the instructions, because she was captured and searched by an officer of inferior rank to a lieutenant. And, moreover, that other instructions annexed to the treaty had not been complied with.

That the *Felicidade*, even if lawfully captured, remained a Brazilian vessel. See Article 8 of regulations for Mixed Commissions attached to the treaty of 1817. *A fortiori*, if unlawfully captured. That the prisoners, therefore, were not in the Queen's peace; and, consequently, were not triable by our laws. That if unlawfully captured, their offence was not murder, it not appearing that they exercised more violence than was necessary for their liberation.

The counsel for the Crown contended that the prisoners were lawfully captured as pirates, being *hostes omnium*. That their surrender operated as a forfeiture of any right they might previously have had to resistance. That they were taken substantially in conformity with the treaties. That being in actual custody of a British officer, they were in the Queen's peace, and that even if unlawfully captured, their offence was murder.

[This argument is not given at length, because all the points taken seem to have been re-argued before the Judges.]

The learned JUDGE then delivered judgment, having complimented the counsel, and particularly Serjeant *Manning* on the learning which had been brought to bear on the subject. With respect to the cases referred to, he saw no analogy between them and the present case. In the case of *Depardo* (1 Taunt. 26,) which had been cited, the wound being inflicted on land prevented the Lord High Admiral interfering. The case of *Rex v. Azzopardi* (2 Mood. C. C. 288,) afforded, too, no illustration, because in that case the indictment was framed on a particular act of Parliament, and it was required that the prisoner should be amenable to that law. He next referred to the state of international law. The sea was the highway of nations, and rovers, thieves, and pirates, who infested that

highway, were liable to punishment as on the highways of lands in a civilized country. They were deemed the enemies of all nations. They carried their depredations against all nations, and were properly treated as the enemies of all, to be hunted down and punished by any country whose ships had power to overtake them. The high sea was the highway of the world, and every country on the earth possessed concurrent dominion over it. The jurisdiction over it was not confined to France, to Portugal, to the Brazils, or to Great Britain. Every country might seize a character such as that of the pirate, and punish him according to their own laws. That being so, a treaty was made between the Emperor of Brazil and this country by which it was declared the dealing in slaves should be deemed to be piracy, and he had been told that piracy was piracy *sub modo*. He protested he did not understand what piracy *sub modo* was. It was the same act to fire into a vessel and sink her, by which she would be sacrificed; as if a vessel were seized by a rover and carried off: it was an act of piracy: so if a person were to go on board and abstract any portion of her property, such would be an act of piracy differing only from the others in form. In the same manner it was an act of piracy to deal in slaves.

If two countries agreed, that the subjects of each who dealt in slaves should be deemed guilty of piracy, the dealing in slaves became piracy with all the incidents belonging to that hideous crime. Then if that were so, according to the evidence before the Court, were the terms of the treaty complied with? He confessed there at first appeared to his mind some difficulty in saying whether the persons who navigated the Felicidade were actually carrying on the African slave trade, but he had now no doubt on the point. It occurred to him to inquire at which point they were to stop; if it was not carrying on the slave trade unless slaves were on board, the transaction could never be perfect, because when taken the act intended would be prevented, of taking the cargo of blacks

across the Atlantic and selling them to the proprietors of the plantations there. The intention of the act of Parliament which embodied the treaty with Brazil was to prevent the carrying on the slave trade: vessels being fitted out for the purpose was part of the machinery for carrying it on, and it was to prevent the machinery being put in motion, that as he understood, that act of Parliament was put in force. The fitting out a vessel, hovering on the African coast, and taking on board the provisions and water for the sustenance of an intended cargo—was a carrying on the slave trade within the meaning of that treaty. The *Felicidade* was therefore guilty of piracy, accordingly one of her Majesty's cruisers seized the vessel—the commander surrendered, he did not object; in the first place it struck him that they had a right to take this vessel as engaged in that trade, and being thereby a piratical vessel. Who took this vessel, the *Felicidade*? Her Majesty the Queen of England. The Crown of England was responsible for the actions of her officers done under its command. British subjects were on board in the care of her, and yet it was said she was not under English dominion.

He agreed entirely with his learned friend Serjeant *Manning*, that no act could be here inquired of, which was not *contra pacem regina*, but could it be said that the vessel, when British officers had the command of her, and British subjects were on board, was not within the peace of the Queen? It was a most monstrous proposition. It was a very different case with a foreign vessel with foreigners on board. Every man sailed under particular colours, and he became in navigation the subject of that particular country. Therefore if a foreigner were to enlist on board a British ship, and were to be slain by an English sailor, could any one doubt that the act would be *contra pacem*, and amount to murder? No doubt of it. The fact was a floating jurisdiction attached to every bottom throughout the world. That being so, they had taken this vessel, a piratical vessel, if not piratical men on

board—it was surrendered to her Majesty, it was in the keeping of her officers, men on board the vessel, not belonging to her, rose on the crew; the object was to run away with that ship—Why! could any one doubt that that was their object to rise against those who had her in legal possession—and in that illegal design they caused the death of those persons. He had not the slightest doubt that would be the crime of murder. He considered the articles or directions were merely directory for the purpose of carrying on the machinery, by which the suppression of the traffic took place. It had been urged that the men were not cognizant of the law. If on board a British vessel they deprived human beings of life, ignorance of the law of England would not prevent their suffering punishment; with regard to the jurisdiction, he was clear the Court possessed it; that the detention was legal, and even if illegal, would not diminish the crime below murder.

The Counsel for the prisoners here requested the learned Judge to reserve some or all the points which he had overruled, for the consideration of the Judges.

His Lordship said he had no doubt whatever on any of the points, and, therefore, felt it his duty to refuse the application.

Manning, Serjt., rose to address the Jury for the defence. He said he should very imperfectly express the feelings of anxiety with which he rose to address them, if he were simply to say that within his own limited practice as an advocate, he had never incurred a responsibility so great as on the present occasion, when he considered that on the efficient or inefficient discharge of his duty might depend the lives of the ten prisoners at the bar—of ten fellow-creatures, whose bosoms were animated by the same hopes as his own, and susceptible of the same fears. If they had been placed in the same circumstances in which we have been placed in early life—if they had been withdrawn from those influences from which they never had the power to withdraw themselves, they might have been as valuable, as respectable, and as estimable members of society

as any ten men within the hearing of his voice. They must excuse him if he felt almost inadequate to address them. Still he would exert himself, and endeavour to lay before them a correct view of the circumstances under which the prisoners were placed before them, as well as of the duties they were called upon to discharge. The subject of the charge against them was the death of Mr. Palmer, of H. M. S. Wasp, and the circumstances of the charge were varied in the manner in which he should state to them. The first count in the indictment, charged them with having destroyed the life of Mr. Palmer by stabbing and cutting; the second, with having taken away the life of Mr. Palmer by beating, &c., but he apprehended that none of the evidence would be construed to apply to that count; the third charged them with causing the death of Mr. Palmer by drowning. It was by the first or third count on which they would be convicted, if convicted at all. The other counts of the indictment allege that it was the death of a person unknown, but as there was no possible doubt of identity, all those counts might be left out of the question. The first and third counts alone required consideration. That Mr. Palmer came by his death on board the Felicidade was a fact which he was not about to dispute.

The only question for them to investigate was, by what means, and by whose act that unfortunate gentleman came by his untimely end, and whether the act, if committed by any prisoner on that indictment amounted to murder, was a less offence than murder, or was no offence at all. They (the Jury) were present last night at the discussion about stopping the proceedings. On that occasion he was obliged to take the facts as proved, because, unless he had admitted them to be true, for the sake of argument, he had no right to make any attempt to stop the further proceedings. The case was now very different; he was not obliged to admit the truth of any part of the evidence, and he now denied the statements generally and the arguments founded on them by his learned

friends. He would tell them that it was not sufficient to know that several deaths were caused on the *Felicidade*—it was necessary for them to know that the persons whom they convicted were concerned in causing the death of the unfortunate gentleman, Mr. Palmer. Although he admitted that death had been, he did not admit that the prisoners were the persons who caused the death. They had three witnesses called before them. Cuqueira was the first—the other two saw nothing of the transaction—Cuqueira was the only person who saw it, and who was concerned in the transaction. Of this Joaquim Antonio Cuquiera, he solemnly and unhesitatingly said that he was the prime mover and principal actor in this most lamentable transaction. He should be able to prove that accusation in the clearest manner, if he were only allowed to call persons who were implicated in the transaction. But they were all placed in that dock, and could not be called as witnesses. Others were left in Africa, or had gone to the Brazil; he could not call them, but he could show them the part which Cuquiera took in the transaction, which he would do to their entire satisfaction. Cuquiera was the captain of the *Felicidade*—he was prisoner in the *Felicidade* at the time of the capture of the *Echo*, and he alone was interested in the recapture of this vessel. Although *Serva* is said to have claimed the vessel in a conversation which is said to have taken place between him and Cuqueira, yet it was certain that to whatever part of South America the vessel was brought, she would certainly have been claimed by Cuqueira and the other owners. The property of the vessel would have been in Cuqueira. He was the principal person interested in the recapture of the vessel, and he was engaged in the planning and executing the recapture.

He should show this by the contradictions which the man had made. He should contradict him on the most material fact. The *Felicidade* bore down on the *Echo* with Brazilian colours. Owing to the weakness of the hands in the *Echo*, those in the *Felicidade* were encouraged to fire a shot into her.

Cuqueira said, in his evidence, that he directed the gun, but that although he did so under the command of Serva, another person put the match to the gun. But they had heard, in evidence from an English sailor, James Wood, that when Cuqueira had elevated the gun, a man came with a match, and that Cuqueira snatched it out of his hand and fired the gun. If it depended alone on that fact, it was plain Cuqueira was actively engaged in the recapture of the Felicidade, and in the attempt to recapture the Echo. He seemed to be a very cunning man, but when such a man had to tell a story with many circumstances, he might not make his story consistent. A cunning man making fictitious statements at several times would vary those statements in material points. It was well said liars should have long memories. He would dismiss the apparent contradiction to which he alluded last night, and which arose from the ambiguous meaning of a Portuguese word, and would come to a real contradiction. Cuqueira stated at Plymouth that the reason he did not fire on the English boats, sent from the Wasp to take the Felicidade, was that he saw that the English were well armed.

On his examination yesterday he stated he caused the arms to be thrown overboard before he saw whether the English were armed or no. That was contradiction the first. He now came to contradiction the second. He said that after the quartermaster had struck Alvez and thrown him overboard, Alvez swam to the boat, and afterwards came aboard the vessel. Now they had from the evidence of Rosaigre, the most satisfactory proof that he was not in the boat at all, and that he (Rosaigre) never saw Alvez during the whole time he was in the boat. Rosaigre had told of all who were in the boat, and Alvez was not of the number. Cuqueira further said that he went to the helm, in order to relieve the Englishman. What was the testimony of the other two men, one coming from below, the other from the boat? Why, they both state that Manuel was at the helm. That was another proof that Cuqueira spoke, not from fact, but from invention, and because

he wanted to conceal the transaction. He had proved one of these contradictions, on the evidence of a British seaman, called on the part of the Crown. Would they on the unsupported testimony of this man say that those persons had taken the part in the affray which he assigned to them? Cuqueira said that Mr. Palmer was stabbed by Majaval, who stood there. But did they not think it very probable that if Cuqueira was the person who really took the part in this transaction, which the snatching of the match from the hands of the gunner plainly implied; did they not think that he was also the person who planned and executed the whole tragedy? Was there a gentleman in that box who would apply the slightest chastisement to an apprentice on the testimony of a man so stained in blood and in perjury as this man? It would not be sufficient that the jury had evidence that these persons were on the deck—that they were so placed that they were compelled to second the plan of Cuqueira. In his evidence Cuqueira might have favoured those who seconded him, and implicated those who were reluctant to forward his designs.

[The learned counsel then proceeded to make some remarks on the competency and impartiality of the interpreter.]

He was a very good French interpreter—his French was better than his English—but with respect to Portuguese, why he did not profess it. He spoke the Spanish, but the Castilian and the Portuguese differed as much as the Italian and Latin languages. He had too, throughout the examination, shown a bias against the prisoners. He did not make any accusation against the interpreter, he merely stated a matter which he considered to be unfavourable to the prisoners. He should now proceed to show that the Felicidade was not in possession of her Majesty. It was a maxim of the law of England that the Queen could do no wrong. It had often been considered by high prerogative writers, that what the King did could not be wrong. But the true meaning of the maxim was, that what would be wrong for any other person to do, the King could not do at all, though it was true the King might

physically do the act. The capture of this vessel was the wrongful, unauthorized act of the officers. Now to apply this doctrine to the present case. The officers of the *Wasp* went on board the *Felicidade* in a way in which they were not justified, and although if they had gone aboard claiming the vessel as his (the learned counsel's) property, he should thereby have gained possession, yet as they went wrongfully in the name of the Queen, the Queen got no possession at all. That being the case, the *Felicidade* was not in the possession of her Majesty. The officers on board were mere individual personal trespassers. The foreign character of the *Felicidade* continued in precisely the same state as before she was entered. The *Felicidade* then being a foreign vessel, the transactions of those on board, even though against English subjects, did not come within the jurisdiction of the English Courts. If they considered that the vessel was wrongfully entered, then the Queen obtained no property in it, and the acts of the foreigners in it were not cognizable by the laws of England. Was this offence then to remain unpunished? No; it would subject them to the penalties of the laws of the country to which they belonged.

With respect to what was said yesterday of the convention between England and Brazil, there was no evidence that these persons were the subjects of his Brazilian Majesty. One certainly was not—for he was a Spaniard. The others speak Portuguese, but the only evidence that they were Brazilians was that they sailed from a port of Brazil. It was no part of the convention that persons sailing from Brazil, and engaged in the slave trade, should be treated as pirates. It ought to be shown distinctly that they are Brazilians, and that they are not Portuguese. But even supposing them to be Brazilians, the treaty alluded to has expired, and a bill was even now before Parliament, to give effect to the first article of the convention. Sir R. Peel had said that in the course of thirty years there was no one instance in which this article had been put into execution, and if they consigned those men to the gallows it

would become matter of discussion, between Great Britain a first-rate power, and Brazil, a third-rate power, between England, which had renounced the slave trade, and Brazil, which had pretended to renounce the slave trade. If these ten men had been Frenchmen, he would dare to say that no minister would recommend her Majesty to execute them, notwithstanding the *entente cordiale*.

(The learned Serjeant then entered at length into the law of the case. This part of his speech, however, is omitted, as the substance of it will appear in his argument before the Judges.)

He concluded by saying the prisoners are entitled to an acquittal, because the offence is not proved—it is not proved in a manner that can render it available by the indictment. But supposing that the *Echo* was properly taken, and supposing that the *Felicidade* was properly taken, and the crew of the *Echo* were properly removed to the *Felicidade*; and supposing that Cuqueira had given a true account, making all these admissions, what is the nature of the crime committed? I submit that it is an attempt, the principal object of which ~~was~~ their liberation. The offence, if crime at all, did not amount to the crime of murder, of malice aforethought, but merely to manslaughter. I think these persons entitled to a full acquittal. It is an impossibility to come to a conclusion as to how Mr. Palmer came by his death. Although you may be convinced that the greater part of these persons were concerned in a most dreadful transaction, and you may desire that they should not escape for the part they have taken, yet as each name was submitted to you, I am sure you will feel it your duty, and not a painful duty either, to give the benefit of any doubts you may have respecting any individuals. However you may condemn the traffic in which those persons were engaged, you ought not to forget that within forty years it was carried on in this country—that the late King William the Fourth, as Duke of Clarence, constantly supported the slave trade in the House of Lords. I hope, therefore, that you will make allowance for the pre-

judices of these men, and that you will look with commiseration, if not indulgence, on persons who still consider that traffic lawful.

Mr. *Collier* addressed the jury as follows :—You will readily believe that I do not merely use a common form of expression, when I say, that I rise under feelings of the deepest anxiety. I know of no responsibility more awful than to be entrusted with the defence of the lives of one's fellow-men—a responsibility which must be most painfully felt by the most able and experienced Advocate at the Bar: how much more by me, inexperienced, and I fear incompetent: How much more when I feel that I am not defending Englishmen, but miserable foreigners, far from their native land, in a country where they do not possess a friend; of whose language, whose manners, and whose laws they are utterly ignorant, and who have believed for months past, wretched men, that they were, to be dragged, not to trial, but to execution, nor have dared even to demand a priest, for they thought it would be denied them. The weight of responsibility which hangs over me is, if possible, still further increased by the feeling which I conscientiously entertain, that, were I in that jury-box, nothing on earth would induce me to convict these men of murder. I believe, I know—that, assuming the evidence to be true, they have not committed murder. They have exercised but that right which Nature tells every man he has, to recover his liberty and his property of which he deems himself unjustly deprived—that, moreover, the main witness against them is a cunning, ferocious, perjured ruffian, the prime mover, if not the sole actor in the melancholy transaction on board the *Felicidade*; that the other witnesses may or may not have been engaged in it, and have, in all probability, been instructed by *Cuquiera*—that, notwithstanding all we have heard, the true history of the transaction is known only to Providence, and those who witnessed it, and that if men are to be sacrificed upon such evidence, no life would be safe. Feeling all this so strongly as I do, I must ever believe, that if I fail to impress

my feelings and convictions upon you, the failure has arisen from my own incapacity; and shall never cease to regret the day on which this defence was entrusted to my care.

Before I approach the main question, I cannot but advert to one or two causes of prejudice against these prisoners which can scarcely have failed to influence your minds before this inquiry began. One of these is the manner in which this case has been prejudged by the press of this country. In the first place, *ex parte* examinations of these perjured witnesses before the magistrates have been circulated throughout the country. This, though it could not fail to prejudice the case against the prisoners, was, I admit, unavoidable, and must be ranked amongst the necessary evils attached to that great national blessing,—a free press: but, not content with publishing these uncontradicted *ex parte* statements, editors of newspapers have taken upon themselves to draw and publish conclusions from them, and to add to them statements positively untrue.

I read in a widely circulated paper an article which stated, that although Cuquiera and the two blacks were subjected to the most stringent cross-examination their testimony was in no degree shaken. This is not true—but very few questions were asked them; and no attempt was made to involve them in contradictions, because it was not thought desirable to call their attention to those parts of their story which they had not sufficiently patched up, lest in the interim, they should take the opportunity which has been afforded them to mend it; for since, as well as before their examination before the magistrates, these three men, so strongly suspected by the Crown, as to be kept in irons, have been placed together, and afforded every facility for concocting a story. Not content with misstating facts, editors of newspapers have actually indulged in virulent invective against these defenceless men, awaiting their trial for their lives. The most exciting and exasperating language has been used. I read the other day, a leading article, written apparently expressly for the purpose of prejudicing the case against them. We have heard

of writing down a demagogue or a minister, but to write down wretched foreigners on trial for their lives! What a cruel, what a dastardly abuse of the mighty powers of the press!

Again, it is almost impossible, however much we may endeavour, to keep out of our minds that these men are dealers in slaves, or to repress the strong feelings which naturally arise against that unholy traffic;—but, gentlemen, whether or not they are dealers in slaves, is not the question which you are here to try. I know the difficulty of dismissing prejudices from one's mind, and sensibly feel the difficult and arduous task which is imposed upon you by your oath,—you cannot escape from it however—for I need not remind you, that if you allow your feelings against these men as slavers, however remotely, to influence your verdict on this indictment, which is alone for the murder of Mr. Palmer, you will lay the deep crime of perjury upon your souls. To render this task to you somewhat less difficult, I will entreat you to consider the circumstances of their birth and education. They were born in a country of which slavery is one of the recognised institutions. The governors of their land, the priests of their religion—(and they have not like you, access to the Scriptures for themselves) the merchants, their employers—all those, in short, to whom they have been taught to look up, openly countenance, defend and engage in the slave trade. On the rulers of that country, who, in defiance of solemn treaties, of humanity, of religion, have not secretly, but openly, by precept and example, encouraged and still encourage this horrible traffic; on the merchants who rise to riches and honor in their country by the sale and purchase of human flesh; on all those who form and guide opinion in Brazil, lies a fearful weight of responsibility, and against them, I do not yield to yourselves or any man in indignation and abhorrence. But remember, these are poor ignorant men, of that class which does not guide, but which necessarily follows public opinion. Can you look at them, and believe them capable of thinking out great questions for themselves?—of coming to the conclusion that

their governors, their priests, and their whole country are wrong?—of rising superior to the prejudices of the place and time of their birth and education?—never from their earliest infancy, has it been whispered in their ears (what you have so often heard,) that the African is a man and a brother. They have been taught to consider the negro a being without a soul—nearer akin to the brute than to the human creation, in whom God has given the white man a right of property, whom the most honoured and respected men in their country sell and buy as we do horses and oxen—and that it is no greater offence against the laws of God or man, to bring home a cargo of slaves than a cargo of cotton. You have been taught better—you live in a country which has acquired eternal honour for herself in taking the lead among the nations of the world in the suppression of the slave trade—you are not familiarized with slavery as these men have been—you have never seen it—you have only heard of it, characterized with expressions of disgust—and of all words, the word “slave” sounds most grating in your ears; and yet, even in this free and enlightened country, as we at least vaunt it, there have been in former times merchants who have grown rich by the slave trade—till lately that traffic was unforbidden by our laws, and upheld by public opinion, and our most eminent men; not a dozen years ago, slaves in our colonies were treated by our laws as chattels, the subject of barter, sale, and mortgage. Gentlemen; let us be thankful for the circumstances in which it has pleased God to place us, without presumptuously determining what we should have been under others—whether or not, born and trained as these men, we should have done otherwise than they. We are taught that at a higher Tribunal than this, not only men’s actions will be considered, but the circumstances which surrounded them, and the temptations which beset them—may these men meet with a no less merciful consideration at your hands. Thank God that you live in this free, happy, and enlightened country, and have compassion on your less fortunate fellow-men.

I now approach the main questions which you have to consider—which are, First, whether assuming the evidence you have heard to be true, the killing of the English on board the *Felicidade* amounted to murder. Secondly, whether the evidence you have heard, is to be relied upon.

You are well aware that any independent country may carry on the slave trade, unquestioned at least by any other country—that its subjects have a right to resist any interference with them, and to recapture their vessel if she be taken; to carry on the slave trade is no crime against the law of nations, and it is necessary to guard yourselves against confounding it with piracy in the common acceptation of the word. A pirate is, as his Lordship yesterday observed (I am sure without any intention to prejudice your minds), a robber of the ocean—an infestor of the highway of nations—an enemy of all mankind, who hoists the black flag, and deals out death and destruction on all he meets; but these are peaceable and inoffensive men, who go in quest of a cargo which they have, unfortunately for themselves, been taught to consider a lawful one,—who molest no one, and are anxious not to destroy, but to avoid all they may chance to meet; to apply to them our idea of a pirate, is to palter with words in a double sense, most injurious to them.

In 1826, as you have heard, a treaty was concluded between us and Brazil, the first article of which declared that dealing in slaves by any subject of the Emperor of Brazil should thenceforth be deemed piracy. In defiance of that article the Emperor of Brazil has notoriously encouraged his subjects to traffic in slaves: with him therefore, and not with them, ought that blame to rest. By the second and third articles of this same treaty, it is declared that a certain former treaty with Portugal shall be adopted, word for word, by the high contracting Powers, which treaty, amongst other things, declares that no vessel shall be detained under any pretext whatever which has not slaves on board, or by any ship not belonging to her Majesty's navy, and provided with special

instructions annexed to the treaty, and declared to be an integral part thereof, and that no vessel shall be searched by any officer under the rank of a lieutenant. Printed copies in Portuguese of the treaty, and the instructions annexed to it, are furnished to Brazilian slavers, to acquaint them with the circumstances under which they may or may not be lawfully captured. These men were well acquainted with that article in the treaty which prohibits vessels from being taken which have not slaves on board, and the captain and crew of the *Felicidade* not having, and not having had slaves on board, believed themselves to be unlawfully captured, and did not resist, (as indeed the captain admitted before the magistrates, though he has thought fit to deny it since upon his oath), only because they saw resistance would be useless. The crew of the *Echo* could not possibly divine that the *Felicidade* was an English man-of-war, and whether lawfully or unlawfully captured she was not an English man-of-war.

Gentlemen, here are three articles of a treaty, one of which declares the slave trade piracy, the other two that slave ships shall not be taken except on conditions which have not been complied with. Our ordinary notions of the construction of documents, of Acts of Parliament, of words written or spoken, is to take it all together, and not a part, leaving out the rest. I beg of you, gentlemen, putting aside all you have heard, to ask yourselves how you would construe a treaty containing three articles such as I have described? Would you not say, it is true our Government declares the slave trade to be piracy, but our Government has also said that we shall not be captured but by an English man-of-war, nor by an English man-of-war unless we have slaves on board;—if you had no slaves on board, you would say we are safe, nobody has a right to meddle with us, we will resist to the death;—if you had slaves on board, would you not resist being captured by any vessel not a man-of-war? Suppose, notwithstanding your strong feeling on this subject, you were approached by such a force that you dared not with any chance of safety to your

lives resist, would you consider yourselves bound by your temporary and constrained submission? Would you not look out for an opportunity to recover your property and your liberty, of which you had been wrongfully deprived? If you had formed no such plan, might not a tempting opportunity—your captors, some asleep, some wallowing on the deck in a state of intoxication—suggest the idea to you that your liberty was recoverable?—that if you remained prisoners longer, it would be your own fault?—that then was the time, by a bold stroke, to regain your freedom? You may say, we would have imprisoned our captors, we would not have killed them; but you may not have been strong enough to imprison them—(the only weapons of these men were little knives against cutlasses, and iron stanchions, wielded by Englishmen)—the sole condition of recovering your liberty may have been the destruction of your captors. Put the case to yourselves—put yourselves in the situation of these men. You might have resisted the temptation: you might have preferred to submit to what you considered an unjust imprisonment rather than harm your wrongdoers—and yet who shall say what he might do, under such circumstances? None but the captive can say how strong is the love of liberty in the breast of man! Who shall undertake to say for himself whether a passion so deep and so strong, inflamed by opportunity, might not temporarily overpower all feelings of mercy and humanity? You might have resisted the impulse, you might have given way to it—and if you had, under similar circumstances, regained your vessel, and brought her home with flying colours, that very press which has denounced these men as barbarous ruffians would have trumpeted you as heroes, and your act as a glorious achievement! The same act in the eye of God as that, concerning which you have to judge, would have been lauded as a gallant and meritorious exploit.

Suppose some of our own opium smugglers having been captured by the Chinese, had seized a favourable opportunity of throwing their captors overboard, and regaining their vessel,

would you have hanged them for it? And yet I am wrong; the case is not parallel, for the opium smugglers must have known they were rightfully captured, but these men knew the contrary.

But his Lordship has decided that these men were lawfully captured, though they did not know it, and that if they did not know it, they ought to have known it, and must suffer death for not having known it. His Lordship has held that although the treaty stipulates that vessels shall not be taken unless they have slaves on board, this stipulation is merely directory, and may be dispensed with at the discretion of an officer of either country. That although the treaty says a vessel without slaves shall not be taken, yet a vessel without slaves may be taken. His Lordship may be right, and these men are to be doomed because they did not discover that a certain part of the treaty was directory. It is true that no man in Brazil ever dreamed that these solemn stipulations between two countries were merely directory, and might be dispensed with by officers of either navy. It is true that the Brazilian government now protests against the legality of both of the captures: but these men should have known better. They ought to have studied the treaties, and to have discovered what in them was or was not *directory*, and ought to have taken the same view as his Lordship. They believed, as every man of ordinary apprehension would naturally believe from reading the treaties, that they were not lawfully captured. They yielded to might, as they thought, and not to right, and took the first opportunity which presented of recovering their liberty and their property. To escape from unlawful custody even by the death of one's jailor, is not murder by the law of any nation under the sun, nor by any law written in the human heart. I say then they have not committed a murder in the eye of God; they are not condemned for murder in their own consciences; but nevertheless they are to die, because an English Judge pronounces (what they have heard for the first time) that certain stipulations in a treaty are *directory*, and not compulsory. Another

Judge might possibly hold that these stipulations are compulsory. Good God, gentlemen, think of human life depending on such chances as these! You well know that in civil cases an appeal lies as a matter of right from the decision of the Judge, and the most confident decisions have turned out to be wrong. His Lordship, however high on authority, is not infallible, and the frightful possibility exists that these men may be convicted by mistake, and if your verdict be guilty, no power on earth can save them.

Many of the most able lawyers in the kingdom, exclusive of my learned friend, disagree in opinion with his Lordship—the Brazilian government and nation put upon the treaty a different interpretation: this important and difficult point is now under discussion before Parliament: my learned friends on the other side admitted these and other points about which the authorities are silent, to be nice ones, and fully expected, it seemed to me, that they would be reserved for another tribunal: my learned friend and myself put it to his Lordship that we argued under disadvantage, not having time or opportunities for consulting the books: but his Lordship has declared his mind to be made up, and has refused to reserve anything for the opinion of the other Judges. Such being the case, my only resource is to appeal to you. I thank God that his Lordship does not sit here alone, but that you are here an independent tribunal; that by the laws of this country the lives of men are not entrusted to lawyers alone, but to twelve men also who are not lawyers, and who will refuse to sacrifice human beings upon doubtful and unobvious constructions of treaties and statutes! I appeal from his Lordship to you, and call upon you to rescue these men from the peril in which they are placed. Let not the lawfulness of their conviction be discussed (and discussed it must be between the two countries) after they are dead! Every man in this country is supposed to be cognizant of its laws; men of your intelligence and education cannot but be familiar with the legal signification of the word murder. You know that if one man poisons another he commits murder; he

who shoots a traveller for his purse commits murder; he who stabs a rival commits murder; but if a peace officer enter your house without a warrant entitling him to do so, in killing him you do not commit murder,—it is not murder to kill any man who wrongfully deprives you of your liberty or property for the purpose of recovering either—the offence is justifiable homicide, or manslaughter according to the circumstances. It is for you to weigh all the circumstances of this case, and to say whether the killing Mr. Palmer was murder, or manslaughter, or justifiable homicide. If you doubt, for God's sake give these unhappy men the benefit of it, and find a verdict to be followed by a revocable sentence.

Gentlemen, I have a right to put it to you whether at least the nine men of the *Echo* were not mistaken in point of fact, as to the *Felicidade* being an English man-of-war; for that she was such his Lordship has ruled, and that if she were not, the capture of the *Echo* would not be lawful. It has been held that a man shooting another, mistaking him for a thief, is not guilty of murder. The crew of the *Echo* could not possibly divine that the *Felicidade* was an English man-of-war; if they were mistaken on that point of fact, I submit they are entitled to your acquittal of the crime of murder.

A vessel, apparently Brazilian, certainly not English, approached them with no flag flying, where every man would look to see the flag of England, at the mast head; there was indeed a flag in the jolly-boat, on the deck of the vessel, which would probably be hidden from view by the ropes and sails, and, according to the evidence for the prosecution, might, or might not be seen. Lieutenant Stupart approaches them in a boat at nine o'clock at night, at which time it is quite dark in that climate,—they sheer off, naturally wishing to have as little as possible to say to this very questionable, and for all they knew, piratical Brazilian vessel, with English on board. Subsequently they were overtaken by this same vessel again, and were boarded and taken in the dusk of the evening by a jolly-boat commanded by a midshipman, when the English flag was not visible.

The midshipmans searched the vessel, although it is expressly stipulated in the treaty, that no vessel shall be searched by any officer under the rank of a lieutenant. They are sent on board the *Felicidade* at night, and put into the fore-castle without the smallest explanation of the grounds on which the *Felicidade* claimed to take them. Conversation was prohibited between those who were in the fore-castle and *Serva*, the Captain, who was on deck—according to the evidence, *Cuqueira*, who was likewise on deck, and *Serva*, had but one conversation, in which the circumstances of the capture of the *Felicidade* did not transpire. It did not appear that there was, or could have been any conversation between *Majaval* and any one man of the *Echo*. *Serva* probably did not, none of the others could know under what circumstances the *Felicidade* had been captured. If they had heard anything of an English man-of-war, they must have heard of the discipline which there prevails. If there was nothing to induce them to believe the *Felicidade* to be an English man-of-war when they went on board, there was everything when they were on board, as far as they had an opportunity of observing, to induce the belief that she was not so—a sentry asleep—the greater part of the crew drunk—the officer in command witnessing this state of things without expressing the smallest dissatisfaction. Every circumstance which met their eyes was opposed to the notion that they were on board an English man-of-war. Every thing was irregular, incautious, ill-managed from beginning to end; and so far from it being clear that they knew they were legally captured, it appears absolutely certain that they could by no possibility have arrived at that conclusion. If Lieutenant *Stupart* and his crew made an unlawful capture, these men could not consider them other than pirates; and I submit to you confidently, that being led into a mistake of fact by the conduct of Lieutenant *Stupart* and *Mr. Palmer*, their offence was not murder.

Gentlemen, I have contended, (what I sincerely believe), that the act committed on board the *Felicidade*, was not

murder by the laws of God or man. I next come to the evidence which implicates these men in the transaction whatever it be, and I undertake to show you, that it is not such as you can safely convict upon. The whole case for the prosecution relies upon the evidence of three men, who were on board the *Felicidade* at the time she was taken by the *Star*, and who concurred with the rest in giving a false account of her—neither of whom until three days after her capture, communicated what they now choose to call a true history of the transaction, all of whom have the strongest interest in giving some account which does not implicate themselves, and which does implicate every one of these men, and stop their mouths as witnesses. These three witnesses have been most improperly kept together during a great part of their voyage home, and have had ample opportunities for concocting a story among themselves. Two of them are obviously clever and cunning men, always ready with an answer—always prepared with some loophole to escape through any difficulty in which they may find themselves. The African is a poor, ignorant, untutored slave, whose religious knowledge extends but to this, that there is a certain book belonging to the Almighty which people swear by—of the contents of which he has not a notion. It cannot be safe to take lives on the testimony of such a witness! Such a man would obviously tell any tale which he may have been taught by the other two. It is true that they all tell you they have had no conversation whatever on the subject of this transaction, but do you believe it? They were on shipboard together in irons for a considerable time. We know that there is no place in which men more readily and almost irresistibly communicate what passes in their minds to each other than on board ship. The absence of communication with the world, of those innumerable novelties which ever present themselves to those who live in it, the everlasting monotony of sea and sky, drive mens' thoughts to the past. The want of choice of associates, and the necessity of social converse—their only pleasure—forces them

together—whatever is uppermost in the mind of each is divulged; the deepest secrets are revealed, and many a disclosure is made afterwards bitterly repented of on shore. If this holds generally, as it notoriously does, of fellow-passengers on board ship, how much more must it apply to men kept in irons together—companions in misfortune—shunned by every body—in the same situation as if thrown together on a desert island! Of course the topic uppermost in their minds would be that most frequently discussed among them; and yet during the whole voyage, on which they were on friendly terms, if you believe them, not one word passed between them respecting what occurred on board the *Felicidade*! I will not insult your understanding so far as to suppose that you believe this, or that you doubt that these men, in so swearing, have been guilty of perjury.

If no contradiction had been discovered between them, if no other part of their story were inconsistent or obviously false, I call upon you, on this ground alone, to disbelieve them, and to refuse to act upon their testimony. It is possible that some of you may say, the main parts of their story may be true, although they may be perjured in this. Mr. Palmer may have been murdered, as they say, notwithstanding they have talked about it, and deny having done so; but, gentlemen, I cannot but represent to you the danger of reasoning in this way on matters of life and death when you ought to require not possibility or probability, but certainty. You do not put men to death because they *may have* committed a murder. One false oath proves as well as a thousand, that the witness has not a conscience, and fears not the penalties on perjury in this world or the next. If he fears not to commit perjury, how shall you take upon yourselves to say what part of his story is true, and what is false, with such confidence as to dare to incur the responsibility of passing the irrevocable sentence of death? Luckily for all of us, juries of this country, as a matter of practice, do refuse to condemn men upon evidence which they believe to be wilfully false in the smallest particular. If

it were not so, no man would be safe. Suppose any person actuated by some strong motive of ill-will or otherwise, (and in this case, these witnesses have the strongest of motives,—the desire to save their own lives), chose to accuse any one of you of a crime against which his Nature revolts; he might fix on a time, on a place, on surrounding circumstances: (how few men cannot invent incidents!): he might add conversations both before and after the event, (and what so easy as to invent conversations)? A conversation may be made, and got by heart, and put together, quite unassailable by any cross-examination. Suppose a story, with circumstances and conversations trumped up against you, and you stood for your trial in that dock, what would be your chance of safety? It could scarcely be hoped that a man with ordinary ingenuity, would get up his story so clumsily as to be shaken by cross-examination on any of the main incidents of it. He might not, indeed, be shaken on any point, however collateral and immaterial, but the false story might stand, as many false stories have, the ordeal of cross-examination untouched in the smallest particular; and in that case, the awful consequence inseparable from the fallibility of human tribunals would follow;—the condemnation of the innocent! And you well know that in many cases, notwithstanding the caution with which justice is administered in this country, innocent men have, apparently on the most conclusive evidence, been put to death! We know of many such cases; how many more may be there of which no man ever dreamt! I say, if any of you were at that bar where the prisoners now stand listening to the accusation of a perjured witness, where would be your hope of safety? In the chance that a false story could not be altogether consistent, that cross-examination would lead the witness or witnesses into some contradictions on points where they had not fortified themselves, or would bring out something (probably immaterial to the main points of the story), which the Jury could not believe. You would then owe the preservation of your life, the restitution of your character, to the merciful practice of Juries in

this country of rejecting altogether evidence which is wilfully false in any one of the minutest particulars. Give to these wretched foreigners the benefit of that merciful rule to which any one of you may sometime or other owe your own safety. One statement of these men on oath you cannot believe—I undertake to show you that many more must be untrue, that they are contradicted by facts, that they are irreconcilable with each other. I call upon you, then, to dismiss their evidence altogether; and, in dismissing it, you cannot convict any one of the prisoners.

Cuqueira swore before the magistrates that the reason why he did not fire on the boats of the *Wasp* was that he saw they were well armed: this he has since thought an incautious admission. I put it to him whether this was not his motive—whether he had never said that it was? He said, no; he could never have said so, because he threw his arms overboard before he could see whether the boats of the *Wasp* were armed or not. Both these statements were made on oath—one must be false—the witness is therefore demonstrated to be guilty of perjury. Again, he says he did not fire the gun; the English sailor, whom you all believe, distinctly states that he saw Cuqueira snatch a brand out of the hand of Majaval, and apply it to the touch-hole of the gun—here again, then, Cuqueira has committed perjury. Cuqueira swears that he was at the helm when the men from the boat came on board, and kept it for some time after (and he has an obvious reason for placing himself in some position where he could have nothing to do with the affray): the black swears that he was not at the helm when the men from the boat came on board, but that Manuel Antonio was there.

[Mr. *Collier* proceeded to comment at some length on Cuqueira's evidence. According to one account which he gave the affray could have lasted only a few minutes; by another, it must have lasted upwards of an hour. *Rosaigre* flatly contradicted the story of *Alves* coming into the boat. Cuqueira had sworn before the magistrates that all the ten

prisoners, pointing to them, were engaged in the murder of the last sailor—whereas he had now sworn that Alvez was not present at the time; he had sworn that the quartermaster was the only Englishman who fought, and that his only weapons were an iron stanchion and a wooden handspike; that he threw down the stanchion after striking Alvez, and struck the other three with the handspike—whereas the wounds on the heads of the four prisoners were clean-cut, uncontused sabre wounds. Who wielded the sabre?—A Brazilian was stabbed in the side—by whom?]

He continued.—It is then clear, beyond a possibility of doubt, that many of the circumstances which Cuqueira relates to have occurred on the deck of the *Felicidade* did not occur—that others occurred, that there were other actors in the scene—other weapons used, and by other Englishmen, than those of which he has chosen to give us an account. The true history of this mysterious transaction is not known to us—it is known only to God, and those who witnessed it. If some part of his tale is false, is it possible to say how much is false, and what part of it?—who shall presume to draw the line? It may be difficult to say why Cuqueira should have armed the quartermaster with a handspike instead of a cutlass,—why he should have selected Majaval as the man to stab Mr. Palmer, or rather why, as I believe he has done, he should have substituted Majaval for himself. The fact remains that his story is not true. His only object, as far as we can see, was to tell, not what was true, but a story likely to be believed by the English officers, and not implicating himself. He has been cunning enough to prevent my calling any of the prisoners, by accusing them all; but I may state to you that I believe Cuqueira to have been the prime mover, and almost the only actor in this mysterious transaction—that Mr. Palmer was stabbed it is true, but by the hand of Cuqueira, and not of Majaval. This witness, and the other two, by their own confession, have been guilty of telling falsehoods, with a variety of circumstances. You re-

member the tale of their being a new crew, the captain left on shore, &c. ;—when they found that that story was not believed, in consequence of a book of Lieutenant Stupart's being found, and dreaded lest some of their comrades should give evidence against them:—then was the story they now tell concocted, and ample leisure has been afforded them to mature it, and to learn well their respective parts. And, on their return to their own country, they will doubtless justify the perjured tale by which they will have imposed upon you and sacrificed their comrades, by the plea of necessity and self-preservation.

[Mr. Collier here read a passage from Lord Hale on the subject of accomplices. The Jury could not doubt that Cuqueira at least was an accomplice.]

He continued—the French black is a clever shrewd man, always ready with an answer: I do not believe him, and I think you do not. Is it credible that between four and five fathoms astern of a small vessel like the *Felicidade*, of only seventy tons burthen, he should not have been able to see who was at the helm? Is it credible that hearing the stamping on deck which he describes, and the words “kill!” “kill!”—he should have felt no curiosity? is it in human nature to sit still under such circumstances? He said—he felt no curiosity. He was pressed by the learned Judge on this point, and it began to strike him that he must account for his not rising up—upon which he said that dead bodies floating by made him faint! You will best judge whether a man of that sort is likely to be affected with squeamishness at the sight of a dead body, and whether such a sight would not be calculated to stimulate his curiosity to the highest possible pitch: whether it is possible to conceive that he would have refrained from endeavouring to see what was going on on board the vessel—who were killed, who were killing, whether friends or foes were uppermost?

The only other witness to the occurrence is a poor African, in a state of profound religious darkness, with the vaguest, if any, conception of the nature and obligation of an oath. He

would obviously be under the influence of those among whom he might be thrown, nor could any thing be easier than for Cuquiera to instruct him in any lesson he might think fit. The whole of the conversation which he relates to have occurred below, may have been put into his mouth by Cuquiera; the whole of the conversation with Serva which Cuquiera relates, may be invented and then what becomes of the case? No premeditated rising is proved, the affray may have been commenced by the English, some of whom were drunk; the attempt to regain the vessel may have been at first without violence: it may have been their intention to take and bind the English, and the fight may have arisen from their resistance: Cuquiera and the two blacks may have been the only actors: those eight men who are absent, or some of them, may have been the guilty parties. Gentlemen, these are conjectures, any of which may be true, but all of which may possibly be false: I put them to you to shew you the dangerous ground on which you are standing: will you dare to convict men because they *may* be guilty, when any supposition exists by which they may be innocent! If you believe some of them to be guilty, will you convict all on the speculation of being right as to some, or will you fix by hap-hazard on one, two, or more of them, whom on this evidence you think very *likely* to have had to do with the deed? Shall we have an experimental execution? Is it thus you value life?—I will not do you such wrong,—I believe there is not one of you who does not in his heart entertain the merciful sentiment, that it is better that ten guilty men should, if need be, escape, than that one innocent should suffer.

But, gentlemen, there is one other consideration of great importance, which I think it my duty to press upon you. When the Felicidade was taken, eight men besides these were on board—according to Cuqueira, there were fifteen men in the vessel when the affray took place—the black is one, who destroyed himself—where are the other three? one of them was seen, according to Rosaigre, wiping a bloody knife

on the deck, and he was the only man with a bloody knife. Where, I again ask, are the eight men who were taken on board the *Felicidade*? Three at least, perhaps all, were on the scene of conflict—if they were engaged in it, why are they not here as prisoners; if they were not, why are they not here as witnesses? Was it for the officers on the coast of Africa to presume to adjudicate on this question, usurping the function of a British jury? was it for them on such evidence as they chose to believe, to select these men and send them to be tried, and turn loose the rest? even if they took upon themselves to adjudicate that these men were guilty, and the others innocent, was it for them to judge that these three witnesses were enough for you? Do we know too much of this mysterious transaction? does any man here in Court presume to say that more light might not be thrown upon it? Gentlemen, the other men who were taken were examined, and their testimony either did or did not accord with that of Cuqueira and the two blacks. No pains have been spared to get up this case against the prisoners—the feelings of the officers of the *Star* were violently excited, and most naturally so, against those who had slain their comrades—nor can you doubt their anxiety to obtain a conviction: they must have known that Cuqueira, the only witness to the transaction, was a most suspicious one, for they themselves suspected him, so far as to keep him in irons:—to confirm him would have been most important. Did those men who have been liberated confirm him? if so, is it credible that they should not have been brought? or was their story at variance with his? if so, there is no difficulty in accounting for their having been left behind. The best evidence within the power of the prosecutors should have been adduced. Important evidence has been withheld, and it is your duty to presume everything against so unfair a proceeding. Think, gentlemen, there are other men in the world who have witnessed the scene on the deck of the *Felicidade*, whose tale is in all probability widely different from that which you have heard. Will you dare to convict these men while such witnesses are alive, and you have them not before you? What would be

your feelings should any of them, as may be the case hereafter, appear, and divulge, that some at least of those whom your verdict had consigned to death, were but innocent spectators of the fray? should some one of them on his death-bed confess to his priest, that Cuqueira, and he alone, or some others of those who are absent did the deed, and that malignity induced Cuqueira to swear away the life of Serva, with whom he had quarrelled? Would you sleep on your pillows more? Think of such possible cases, such as have happened ere now, and tremble ere you pronounce your terrible verdict on anything short of certainty—beware, lest sitting in judgment on others, you become parties to a foul judicial murder yourselves.

Gentlemen, I have contended that the deed committed on board the Felicidade was not a murder; that the actor or actors in it, whoever they were, struck but to regain their liberty and property of which they believed themselves unjustly deprived: that our nature revolts at coupling this exercise of man's natural right to recover his own, with the deed of him who poisons a rich relative for the sake of his money, or cuts the traveller's throat for his purse; that the evidence you have had is not such as would justify you in convicting for a common larceny; that to take away life upon it would be a hazardous and frightful experiment. The evidence against Serva is that of a man not only anxious to screen himself, but actuated by feelings of deep animosity. Majaval was the cook,—he does not appear to have been on deck during the night, and certainly was not in the forecastle; one does not see how this conspiracy, if there was one, could have come to his ears, for communication was forbidden. Immediately after the transaction he had no knife in his hand, there was no blood on his hands; the black indeed bethought him that there was some on his trousers; a bloody scene undoubtedly there was, and any man present at it might have had blood upon him without being a participator. Will you consign this man to death on the simple assertion of Cuqueira that he stabbed Mr. Palmer? Can you be without a doubt on the subject? Three men, even according to the

evidence, you had, viz.: the two Antonios and Santos had nothing to do with the transaction—they had no knives, and strack no blow.

Gentlemen, no man can deplore more deeply than I do the tragedy which occurred on board the *Felicidade*, rendered still more deplorable by the reflection, that common caution might have prevented it; but what is past cannot be recalled; what is done cannot be undone. The sacrifice of these miserable men cannot recal the lamented youth to life,—it cannot console his mourning friends,—the times are past when men have believed that the souls of the dead can be appeased by the blood of their slayers. You are not ministers of vengeance, it is not for you to dispense what some people call retributive justice, that is to say, blood for blood. We have had enough blood, let there be no more. If these men did not know that they were committing a murder, but struck for their liberty and their property, of which they deemed themselves, and I believe they were, unlawfully deprived; beware, lest if for such an offence, and on such foul and perjured evidence, you consign these ten men who stand before you, living, breathing, sentient beings, in whose veins the pulse of life beats strong, in whose breasts live the same feelings, affections, hopes and fears, joys and sorrows as your own, to a miserable death, and unprepared for eternity, you become parties to a more cruel and deliberate wrong than was suffered by those who fell on the deck of the *Felicidade*. There has been one scene of death already, let us not have another more cold-blooded and revolting, because judicial slaughter, in the castle yard of Exeter.

Mr. Godson then rose to reply. He said the time has now arrived in which it is my duty, as counsel to the Lords Commissioners of the Admiralty, who have conducted this trial on the part of the country, to make some observations on what my learned friends have addressed to you. I trust that no expression will fall from me having reference to any fact which has not been proved, or that I should mistake any part of the law founded, on any proven fact. Excepting only as to

the verdict, my duty is the same as yours. It is the duty of an English advocate to conduct a trial in such a manner, that even the prisoners themselves shall say that it is a fair and impartial trial. I am here to see that the proceedings are conducted according to law, and I seek a verdict only according to justice. I have come here merely in the official capacity in which the Lords of the Admiralty have been pleased to place me. My learned friends who have conducted the defence of the prisoners, have brought to bear on their case all the law that could possibly serve them, and that law has been well supported by zeal on their part. The indictment charges these ten men with killing and slaying Thomas Palmer—Majaval is charged with striking the blow, and the others with aiding and assisting. But it is immaterial as to which actually struck the blow—therefore those arguments which have been addressed to you as to the person who actually struck the blow, are altogether inapplicable if you are only satisfied that one of the men did strike the blow. It is immaterial to the indictment whether the unfortunate gentleman died from the wound or from suffocation in drowning. My learned friend, in pointing out the names of the different prisoners has directed your attention to three of them, against whom no direct evidence can be produced. One of the jury has asked such questions as have led to this discrimination—in my own opening address I have drawn your attention to the facts, but it is well that one of you has so alluded to it, as to confirm the facts in the minds of his brethren. I would say then that with respect to those three, there is no proof that they actually used the knife. With respect to Ribeiro, he appears to have taken an active part, after he had been urged on by being called a coward. If you should decide, however, that any of the prisoners did not actually commit an act of violence, yet they made themselves equally amenable if by their presence they were aiding and assisting. You are bound to include in your verdict all who were present. Your duty is plain, though it might be pain-

ful. Mercy does not lie in you—it is in other hands, and you must not suppose that any lives are sacrificed through doing your duty.

The question of life or death is one with which you have not to deal—that is a question which you must leave to the mercy of the Crown. With respect to the interpreter who has been employed by the prosecution, all I have to say is this; that they had engaged the same interpreter as was employed for the defence, but considering that the gentleman who had been engaged at Plymouth was well conversant with nautical affairs, and that, consequently, he would be familiar with the language used by the witnesses, and considering, also, that they had before found him thoroughly efficient, they have thought right to re-engage his services. I, however, had told them that if, in the course of the trial, they could detect any omission or addition in the interpretation, I should feel obliged by their interference, but they have declined accepting my offer. For five hours, Cuquiera was under examination, and in translating the language of common sailors, it was not to be supposed but that there might have been some mistakes in the rendering of slang terms. I should not have touched upon this question at all, had not the learned Serjeant directed an attack against our interpreter. I know my learned friend is an excellent linguist, but it is a little hard that he should bring the weight of his authority against a man who on his oath said that he had translated correctly and faithfully. You have been told that the barbarous attack on the captors might be justified by some want of caution in not taking their knives from them. Now I assert that there was no want of caution on the part of Lieutenant Stupart. His commander, by signal, informed him that another vessel was in sight, he pursued that vessel and took it. He armed every man with a piece of iron. They had also a boat's stanchion—one end square, the other round. Besides, they had a handspike made of hard wood, probably mahogany, as the vessel came from Brazil. Having taken these precautions he remained on board the Felicidade with fourteen men, not venturing to close his

eyes in sleep. He left the arms, all the arms he possessed, with the young midshipman, and the next morning he proceeded to the other vessel to feed those negroes who had not been fed for forty-eight hours. Serva, the man at the bar, and those who constituted his crew, had 438 men on board that vessel who had not tasted food for forty-eight hours. Serjeant *Manning* had that day repeated the very learned argument which he had yesterday addressed to the Bench—he did so, he said, because he thought he could make it clearer to their minds that a murder had not been committed. But I am astonished that the learned Serjeant has not told you that, in England, the province of the Judge and Jury are quite distinct. The Judge is answerable for errors in law—his learning, experience, and the elevated situation in which he stands requires it from him. It is not from counsel that you are to hear the law.

He continued.—With reference to the convention between this country and Brazil, its first article was still in full force, but the other parts of that convention were not in force—it was the first article which settled that dealing in slaves, by subjects of Brazil, should be deemed and treated as piracy. He should leave the exposition of the law in the hands where it ought to be. The learned Judge had already told his learned friends in their hearing, that supposing the facts set forth in the indictment to be proved, they certainly amounted to murder. He should not go through the whole of the evidence which it was necessary to give to enable them to understand the case—he should merely draw their attention to the principal facts, and he should then ask them, if the case was not plain, fearfully plain, against these men. The *Felicidade* sailed from the coast of Brazil—she was a two-topsail schooner, and was of more than 70 tons. She came to the coast of Africa—went in, and was cleared out again. A British man-of-war bore down upon her. She had all the appliances for the slave trade. The master said that she was for the slave trade. Under the first article of the convention between England and Brazil, the British commander

took possession of her. He took possession of her by the submission of her master. Another vessel started from the coast of Brazil with a cargo of cotton, which she landed in Africa. She was searched by Lieutenant Stupart—she was boarded again and again by that officer. A relative of the prisoner Serva was in command of that vessel, and from the continued searches Lieutenant Stupart and Serva's relative became known to each other.

This vessel passed away from the coast of Africa by night, and was then observed by the men of the *Felicidade*, by whom she was captured with 430 slaves on board. Much had been said about the vessel having been searched by an officer under the rank of a lieutenant, but they had heard that the regulation in that respect was not compulsory, it was only directory. Everything was done under the orders of Lieutenant Stupart; and, therefore, even supposing that that was a fact which they had to find, they must say that it was under the orders of a lieutenant. One of the jury asked a most important question, for the answer to that question left these men without any excuse. This answer showed that the prisoners knew that if their vessel was taken to Sierra Leone, the consequence would be that the negroes would be set free, whilst they would not be touched. They knew it was a lawful prize—they knew that the vessel would be condemned, and they knew all their expenses would be defrayed whilst they remained at Sierra Leone. Such was the humanity of the English laws, and these men knew how safely they might confide in them. They were in lawful custody—they knew that they were in lawful custody, and they chose to kill and slay their captors in order that they might liberate themselves from that custody. It had been made matter of complaint by his learned friend that some of those who were connected with the captured vessels had not been brought here. Why, the fact was, that these men were free—they belonged to a slaver certainly, but they remained in the boat and were not present at this transaction, and they were now either at Brazil or in Africa.

For twenty years England had slept under the convention with Brazil, but he trusted that, in future, men taken under similar circumstances, would be treated as pirates, according to that convention. By the argument of Serjeant *Manning* the *Echo* was a lawful prize, and therefore these men are without excuse for having perpetrated such a horrid deed, when they knew that their lives were in no danger. For the sake of breaking imprisonment, which they knew would last but a few days, they committed this deed. It was said by Serjeant *Manning* that the whole case against these men rested on the testimony of Cuqueira. Now, let them see how the case stood supposing that Cuqueira had given no evidence at all, supposing that he was not alive. Lieutenant Stupart being on board the *Felicidade*, on Mr. Palmer's coming to that vessel, returns to the *Echo*, leaving Mr. Palmer, the quartermaster, and eight English sailors in the *Felicidade* all alive, all well. In one short hour, *Serva* himself told them, they were all dead. They had it from the mouth of *Serva* himself, as he passed by the *Echo*. He (*Mr. Godson*) was alluding to the evidence of the seaman, Thomas Wood, although Lieutenant Stupart heard the same, but he did not exactly understand the language. All this was done in one short hour. If they were to listen to the reasoning of his learned friend that day, they might suppose that these men were not there, that they were in no way engaged in the transaction, and that Cuqueira alone did it. Yes! in one short hour they were all alive; in another they were all dead. He wanted not the evidence of Cuqueira as to who did it. He would ask them if any one answered better the question as to God and the holy Scriptures, and what would become of him if he spoke falsehoods, and what if he told the truth, than the poor negro *Soberino*. On the evidence of that man alone, let them see whether they were not compelled to find these men guilty of the charge alleged against them.

His learned friend even had said that there was no contradiction, no prevarication, no faltering, no attempt to exaggerate

in that man's evidence; he had told them a plain unvarnished story. Being in the hold of the *Felicidade*, he heard the scheme concerted to kill the Englishmen, take the schooner, and with the schooner take the brigantine. Let them remember that was on the testimony of a man, against whom no reproach was cast. On the evidence of that man they had it that Majaval came to the hold of that vessel to know if they were ready. Serva came a second time and called down the hatchway—now is the time. There was then sufficient testimony to satisfy their consciences that the plan was concerted by Serva, Majaval, and some others. Let them mark the deep cunning with which the matter had been concocted. The brother-in-law of Serva had been on board the *Felicidade* over night, and he, Serva and Majaval had the opportunity of speaking together. The next morning the brother-in-law of Serva returned to the *Echo*, and when the conflict was over, Serva made a signal to his brother, that he had succeeded, and to encourage those on board the *Echo* to make the same attempt. The disposition of things on board the *Felicidade* was this; the poor sentry, with feelings which did him honour, but prevented him from doing his duty, had allowed two men who complained of being ill, to lie down on deck. He had also permitted them to come up one by one to light their cigars. All this they must recollect was independent of the testimony of Cuquiera. They had thus an opportunity of observing that several of the English were asleep. Serva having made the order, up came the men. All went up except this negro, and being below he heard noises which were confirmation of what was likely to take place if such a transaction did take place as that which had been described. When he went down into that hold there were Englishmen on board, when he came up they were gone, some one had disposed of them.

Then there was the testimony of the French black. Did they ever hear a man who gave his testimony more steadily, any witness who appeared more anxious to state the truth, and not to mislead them. That person told them that when he

was brought from the Echo, he was put in the boat astern of the Felicidade, and whilst there he heard the word *Mata! Mata!* (kill! kill!) This man had been in the service of Serva eighteen months, and lived in his house two months, and he had sworn that he believed that it was Serva's voice that uttered *mata*. He said that from his position in the boat he could only hear what was going on—if he had wished to have gone hard against the prisoners he might easily have said that he saw that which he had in fact heard. According to his testimony he saw the bodies of two white men come overboard, and he said it gave him a turn, and well it might. This would account for his having no anxiety to go on board. He then found Serva commanding the vessel, and afterwards overheard the conversation between Serva and Cuquiera about the ownership of the vessel. That conversation was confirmation strong that Serva had been the prime mover in the transaction, and that he was determined to retain the Felicidade in place of the vessel he had lost, or to get both, so that he might have one.

[The learned counsel then defended Cuquiera against the charge of being an accomplice.]

An accomplice was one who was contaminated with the guilt which he charged against others; who admitted part of the transaction against himself, and charged the rest against others, and in the case of such a witness, the law required that his testimony should be confirmed. But Cuquiera never had admitted that he was concerned in the transaction, and his whole argument simply amounted to this, that if he had not admitted, he ought to have admitted a participation in the crime. His learned friend applied the law, not to a fact, but to something which he had assumed. He would now show them another confirmation of Cuquiera's testimony. He said that being on board his own vessel, a proposal was made to him by Serva and his nephew to kill the English, and that he objected to it. Now there was a satisfactory confirmation of this in the testimony of the French black, who deposed to the

conversation in which Cuquiera desired to be put on shore as soon as they should come to land. Another confirmation was, Cuquiera said that Serva called on his men to kill the English—the black heard him call, *mata! mata!* Cuquiera said that four were wounded on the head—no words were required to prove this, for when they were again captured by the Star, four of them were found with broken heads. Cuquiera told them that he communicated by sign to the quartermaster, that the prisoners were coming up the hold—if he had not done so, that brave fellow could not have wounded these four men. The difference between his testimony and that of the Rosaigre in reference to Alvez was imaginary—it was not real. He saw Alvez thrown overboard—he saw him on board again, and therefore he swore to a very probable inference, and not perhaps to what he really saw, when he said that Alvez swam to the boat. With respect to his firing the gun, it was in evidence that the gun was surrounded by seven or eight men, and how easy was it for the English sailors in another ship, lying at some little distance, to mistake one man for another in a cluster of men.

After commenting on two or three more apparent inconsistencies in the testimony of Cuquiera, the learned counsel expressed his surprise that in an examination of a foreigner, on matters extremely complicated, and now of remote occurrence, there should have been only five little immaterial discrepancies in a five hours' examination. The learned counsel concluded by saying, gentlemen, it is my painful duty to present these ten men as guilty of murder.

The learned BARON proceeded to sum up the evidence. He said—Gentlemen of the Jury—the ten prisoners at the bar stand charged with a very heinous offence, and after the investigation which has taken place before you, I need not tell you it requires your most particular consideration. Gentlemen, the particular charge against these parties, is that one of them inflicted a mortal wound, causing the death of Mr. Thomas Palmer, and that the rest of the prisoners were present, aiding

and abetting in that act. I should tell you, that by the law of this country—and I believe of every Christian country—the man who takes away the life of a fellow-creature, is guilty of the crime of murder; unless circumstances can be introduced in evidence in order to lessen the criminality, or that criminality can be lessened by the testimony brought forth from the witnesses. You have observed great talents and learning brought to bear on the subject, more especially exhibited by the learned counsel for the prisoners: and particularly by the junior counsel, who, perhaps, overstepping those bounds prescribed in the practice of an English barrister, has erred on the right side, the side of humanity. He has called attention to the facts, and told you you would never sleep on your pillow if you convicted those men, and he believed if your verdict pronounced them guilty, a great outrage and a most deliberate wrong will be done. Gentlemen, these are strong expressions. They do honour to the heart which prompts them, but you are not to be carried away by feelings. On the facts which have been proved, you must exercise your judgment—not your affections or passions, but your judgments—in endeavouring to succeed in discovering the truth. In a British Court of Justice, in which her Majesty administers laws by the instrumentality of her people—by a Jury selected from the people, and a Judge equally selected from that people—the law is administered by you and me to-day, and we respectively approach the administration of it under the same obligation—you by an oath calling on the Almighty to assist you, to do justice on the evidence—I, acting also under the solemnity of an oath, to administer justice between man and man according to my knowledge of law, and the experience I have had during a long life; and by the form of that oath imprecates a curse on that man who violates it. It ends, So help him God. If then he does not perform his duty he wilfully commits a breach of his engagement, and calls on God to visit him with a curse. Gentlemen, it is well to talk of not resting on the pillow; but it is no pleasure to you or to me to be engaged in this sad investigation.

You have a duty, however, to perform, to pronounce on the facts. If you are satisfied the facts are made out, it is your duty to find the parties guilty, notwithstanding the pain it gives you in delivering that verdict. So the part which belongs to me is to expound the law, on my own responsibility —on that responsibility I have alluded to, and which alone guides my judgment. The law is laid down by those persons whose lives have been devoted to the acquisition of legal knowledge, and you, the people, bring your various experience, and apply it to the facts. The law and the facts are thus in safe custody; the Bench having expounded the law, the Jury pronounce their verdict on the facts, (if made out) to which the law attaches. Gentlemen, I thought fit to make these observations, because it appeared to me it was thrown out to you that in your hands rests the decision of this case altogether, and although the Judge pronounced on his responsibility the state of the law, you could break down that law and pronounce a verdict contrary to it. That is not the way the law of England is ever administered. For the purpose of having the law administered, you, the Jury, are selected, and if a prisoner object to one he can desire him to retire, in order that favour or affection shall not be shown in that box; and that justice shall be done according to the evidence, and according to the impression that evidence makes on your mind. Gentlemen, not only is that object sought for, by having twelve gentlemen, subject each to be objected to, but in a case such as the present, where ten unhappy men, separated from their native land, are on their trial, the law in its jealousy against any invasion of justice, allows that half shall be foreigners, resident in this country, of foreign extraction, brought into the box for the purpose of having the matter fairly discussed in order to take care that no injustice be done, and with a view of preventing any prejudice to weigh against the prisoners. Gentlemen, the other six must not suppose for a moment that I say any prejudice exist in their minds, but that is the object of the law, that the prisoner may have a fair trial.

Every witness is heard that he may choose to produce in his favour, and every witness is examined and cross-examined until the case arrives at that point at which we are now come. Gentlemen, I think the case has been conducted on the part of the prosecution with all that forbearance belonging to cases of the kind. I think the learned counsel, who for the purpose of obtaining a verdict on the matter, laid before you all those facts which might bring you to a certain conclusion, showed all forbearance; but, gentlemen, notwithstanding that, it must of necessity have occurred to you that learned counsel appearing on one side or the other will desire to do the best for their respective clients, and, therefore, the counsel for the prosecution uses arguments to bring conviction to your mind of the guilt of the prisoners, while the counsel for the prisoner, by every artifice and by every means in his power, endeavours to extricate his client and obtain an acquittal; thus bold assertions on both sides are made. In cases of this kind, and especially on the part of the prisoners, the consequences are momentous; and you must take care not to be led away by either. Certainly, with regard to the learned Serjeant, all the learning which might assist his clients has been brought, and the zeal of the gentleman who nominally appears for four of the prisoners, promises one day to make him eminent in his Profession. The first step of a good lawyer is to identify himself with his client.

Having made those general observations, I will address myself to the evidence which has been given.

[His Lordship then read through the evidence, commenting briefly on it as he proceeded.]

With respect to Cuqueira, he observed, that notwithstanding he came there having, as he said, nothing to do in the transaction, when they considered the vessel was his own, that he had a dispute with Serva, and his silence on the matter for three days after being on board the *Star*, he (Baron Platt) owned he thought that witness's evidence ought to be watched with very great jealousy, so that they might not be deceived

by any of his statements. The learned counsel had compared him to an accomplice, and he was in some measure justified in so doing, for, though he was not on his own confession steeped in wickedness and taking part in the transaction, still, if a man happened to be an accomplice he might deny his guilty participation, and Cuqueira stood at least in a remarkable degree, as an accomplice inviting the utmost vigilance and circumspection.

With respect to the law on the subject, he said :—I apprehend any man who goes on board a vessel as commander, or part of the crew of that vessel, and sails under any particular colours, is, for any act committed by him on board that vessel, a subject of the power under whose colours he sails ; so that if a foreigner were in a British ship as part of the crew, sailing under British colours, for all purposes of nationality he would be, while he remained there under the dominion of the commander of that vessel, and to all intents and purposes, a British subject. If it were not so, see to what inconvenience we might get. A treaty is made with the Emperor of the Brazil, by which the dealing in slaves is denounced as piracy. If those sailing under Brazilian colours were not to be considered as Brazilian subjects, they might have a vessel, for the purposes of the slave trade, under the Brazilian colours, with a party, foreign to the country which entered into the convention, and the whole law would be entirely evaded. The treaty entered into between Brazil and Great Britain constitutes a part of the international law, as regards the two countries, by which the subjects of both are bound. The subject is that party who is under the dominion of the power, to which he owes submission, whether a King, an Emperor, or a Prince. American sailors and an American crew might navigate a Brazilian vessel under Brazilian colours with perfect safety, if those who navigated the vessel are not responsible as Brazilians.

Gentlemen, the case here is this :—The *Felicidade*, a Brazilian schooner, sailing under Brazilian colours and navigated

by Brazilian subjects, is taken in that part of the globe in which, by a convention between the two countries, it is stated distinctly, those subjects of both nations, who might be found engaged in carrying on the slave trade, shall be deemed and treated as pirates. The description of "pirate" here shows the class within which this particular offence is said to range. From the general description, a pirate is a rover over the highway of nations, hoisting the black flag against any he may meet. If the law of a country place a certain class of persons within the class of "pirates," the same consequences follow; and these men are as much pirates as the men who have committed crimes against the laws of property, and broken the principle of honesty. With respect to trade, for instance, forgery is made a felony, and when made a felony it has all the incidents which attach to any other felony; and, if slave dealing be made piracy, it has all the incidents of piracy. Then, if this vessel was a piratical vessel at the time of being taken, gentlemen, no lawyer, civil or common lawyer—can deny that the vessel was liable to be captured; because it was a piratical vessel. It is captured by one of the powers, not by an individual, and if an English vessel were found in the same waters carrying on the same traffic, a Brazilian vessel would equally have a right to seize that vessel, as a piratical vessel.

It is my duty to lay down the law to you. What is the use of my being here if law is thrown aside? I am presenting it to the minds of gentlemen, who have not been conversant with nice principles of law, in order to apply it to the case. Without the law, no man is safe in this country. I state the law on my own responsibility, as I feel it to be beyond all question, and no British Judge is fit to occupy the seat of Justice if he does not fearlessly give his opinion, notwithstanding what the consequence of that opinion may be. I have not the slightest doubt the taking of that vessel, being a pirate, was lawful. Having been taken, she was used as one of the boats of the *Wasp*, and part of the crew having been put on board she was sent out for

the purpose of following an object descried in the distance. The lieutenant, who is in command, gives chase, at last comes up to the *Echo*, and captures her. What were they to do? Where they to pursue the course pointed out by the Sovereign, the course pointed out by a treaty between two nations in amity? Beyond all question they were. They took the vessel, they found a number of persons on board that vessel—too many to keep safely together considering the number of men the English had; and, therefore, as incident to the capture of the *Echo*, they had a right to remove a portion of the crew for the general safety of all. The removal, therefore, of a portion of the crew from the *Echo* to the *Felicidade*, and also a portion to the boat at the stern of the *Felicidade*, beyond all question was legal, if the capture of the *Echo* were legal. The vessels were close together, the lieutenant commanding the midshipman to go in the jolly-boat from one to the other,—the lieutenant having as much the command as if on the deck of the *Felicidade*—the midshipman goes on board the *Echo*. That was a legal capture. Then we have the *Felicidade* properly taken, and the *Echo* properly taken. If the *Felicidade* was *not*, surely the *Echo* *was* properly taken. There was a right to take her navigating those waters, either by Brazilian ships or British ships. The *Echo* being legally taken, part of these men were removed to the *Felicidade*. The *Felicidade* was made a prison ship, in which they might be kept, as an incidental necessity. Those on board that vessel were in the peace of the Queen, because the command of her was assumed by a British officer, and the helm was assumed by a British subject. She was clearly under the command of Lieutenant Stupart, and one of his men held the tiller of that helm. Then, gentlemen, if the story of this man Cuqueira be true, while all these parties were floating on the ocean, in a bottom which was under the dominion and possession of the British flag, and therefore, under the dominion of her Majesty, this affair takes place.

Gentlemen, if during the time that the British sailors had

possession of the *Felicidade*, any one of them had gone up to one of the prisoners and shot him, that man would have been hanged for murder, for the same protection extended towards British subjects would be extended towards every one in that vessel. It would be a gross proposition to press, that when a man is in custody on charge of any crime, he is less under the protection of the law. A man, though he may have committed ten murders—if one on board a vessel within the dominion of the Lord High Admiral of this country or of her Majesty, had committed ten murders, and another man came up in cool blood and slaughtered him, that man would be guilty of murder. It is the preservation of life, the British law looks to, and whoever takes that life, unless he show a justifiable cause why he commit such an act, is guilty of murder: therefore whatever protection was extended to any one of these parties on board the *Felicidade*, every one of the prisoners had a like protection.

Gentlemen, this differs much from the case of a vessel being taken in war. If during hostilities between two countries a vessel shall be taken by one power, which vessel belongs to another, the crew kept on board the captured vessel have undoubtedly a right, by every force necessary for the occasion, to regain their ship and liberty. And the reason of that is, that what they do is under the power which is in hostility, and any act they commit in effecting their personal liberation is on behalf of the power in whose service they are. But one man on his own bottom has no right to stand up and claim the right of a nation, and to him the right of war does not apply. It is a case of piracy, rising up and committing murder and carrying away this vessel.

Gentlemen, if you think that these parties were on board the vessel, in the manner which has been described by the witnesses, and rose on those in possession of it, their object being to get this vessel, no doubt the crime committed was murder, and these parties will be guilty. By the law of England if several persons unite in an unlawful design, and endeavour by unlawful means to carry out that design, each and every one

is equally guilty ; and, if it happen that one deprive a human being of life, all are guilty of murder. If four or five persons entered into a compact to rob a house, and two break in and two stay outside, and a felony be committed in that house, by either of those who enter, though neither of the three saw it, yet, inasmuch as they went for the purpose of committing a felony, and those who went into the house, by their aid and assistance did commit the felony, they committed the act which the indictment states. The charge against them, as in this indictment, would be for being present, aiding and abetting. If then, you are satisfied these parties did join together for the purpose of murdering the Englishmen, and one gave a blow by which Mr. Palmer was killed, he would have committed the murder, the others present, aiding and abetting, being what is technically called, principals in the second degree. The man whose hand commits the felony is a principal in the first degree, and those who are present, aiding and assisting, are also principals and liable to the same punishment.

[His Lordship having thus defined the state of the law, proceeded to conclude the reading of the evidence]. He remarked that the French negro appeared to be a very intelligent young man, and he did not see there was anything in his manner to induce them to discredit his testimony. That witness could have no interest in telling an untruth, for it was not pretended that he joined in the transaction, and, in fact, he could not, because he was sitting in the boat behind. The mode, too, in which he qualified his evidence, not swearing that it was Serva's voice, but that he believed it was, shewed that he was a cautious witness, and would perhaps induce them to credit him, as the witness of truth. As to Ribeiro, he delivered his evidence free from the slightest inclination on one side or the other, and in accordance with the answer that if he told falsehoods he should go to Hell, and, if he told the truth, he should go to the Almighty in Heaven. If then, the black man was to be relied on ; if they believed he was speaking the truth, it was a most important truth for their consideration, as

it showed there was a previous conspiracy to rise against the English and slay them all.

The learned Judge thus concluded :—Gentlemen, if on this evidence you are satisfied Serva, Majaval, and any other of the prisoners conspired to kill the English on board that vessel, they being, beyond all question in the peace of the Queen—if they conspired to carry out that wicked design, and Majaval, in order to assist, gave a mortal wound to Midshipman Palmer, all those who conspired and joined in aiding and assisting in that bloody tragedy, were guilty of the offence charged against them. Each and every one of those who united in carrying out that part of the general design, the taking away that one life—every one who united in assisting the party—was, no doubt, guilty of the act, though he was not actually the person who inflicted the blow. Gentlemen, if the design was to kill these Englishmen, the slaying each man was a distinct murder. All who united to effect that murder were guilty of the act, because, though the man who inflicted the blow was clearly the guilty man, yet those who were present, aiding and assisting in the murderous and wicked deed, in order to consummate that great wickedness, the destruction of the whole, were equally guilty; in point of law, all who aided were principals in the second degree. Then, it is said, you must find that Mr. Palmer died certainly by suffocation or by the blow. Unquestionably you must find on one or other of these two counts of the indictment to which your attention has been particularly called. There are six separate counts in the indictment, four do not apply to the case as it stands on the evidence, and the only two remaining are these:—the first charges that Majaval inflicted this mortal wound, and the others with having aided and assisted him in so doing; that count alleges that death was occasioned by the wound. The other count differs only by stating the death to have arisen from suffocation, because if the wound only disabled Mr. Palmer, and afforded greater facility for throwing him overboard, and casting him into the sea, he could not be said to be mortally wounded. It is very plain that he certainly lost his

life, and, if the evidence is true, he received a wound and was afterwards thrown into the water. All who joined in carrying out that bloody conspiracy were guilty of murder. But if you think Cuqueira is not to be relied on, you must look to the testimony of the negro, and the black man. If you believe that witness has assigned the death of Mr. Palmer to the true cause, you have the French boy in the boat behind confirming his general statement. Still there is nothing before you to show that Cuqueira was not an accomplice.

All that the law can do is this:—to guard you against founding your verdict on his evidence alone. When an accomplice gives evidence as an infected witness, a contaminated party, the law advises that the Jury should not listen to his story unconfirmed; but if the account of the accomplice, confessing himself guilty, is so confirmed by other testimony, as to lead to the inevitable conclusion that he is speaking the truth, it would really be an absurdity to say the jury were bound to find a verdict *not* in accordance with such testimony. It depends mainly on the evidence of that man, Cuqueira. You have sought with anxiety to find out the truth, and it is my duty to search out the truth as much as it is yours. If the evidence before you enables you to discover where the truth is, you will pronounce a verdict according to that truth.

Gentlemen, the scales of life and death are placed in your hands. It is your duty to look at the evidence dispassionately, without fear or favour. If, in that scale, the measure of guilt is so heavy as to make the beam preponderate, you will convict, but if you think the scale of innocence preponderates, you will give your verdict in favour of the prisoners. If you disbelieve the story altogether, the prisoners are entitled to an acquittal. The lives of a number of individuals depend on the breath of your verdict, but do not let us forget the departed. Eight British sailors have been sacrificed in a most bloody tragedy. Justice must be done, or no one will be safe in their lives and property. It must be done openly and fairly between man and man, and the jury must decide in each case according to that conviction which the evidence brings to

their minds. The scales of justice are in your hands—the sword, I am sorry to say, is in mine. You weigh the evidence, I lay down the points of law; and I am of opinion that the taking of the Felicidade was legal. That if the taking in, the first place was not legal, she was in the keeping of her Majesty the Queen, by her officers, and, being in proper custody, those prisoners had no right to rise and murder their keepers. You have a list of the prisoners, and if you think there is any difference between them, I shall be most happy to give the benefit of that difference.

With these observations I leave the case in your hands. You have attended most carefully to the evidence, and I have been pleased to see the anxiety evinced in the course of examining the witnesses, which may at the time have been deemed tedious, yet every one must be satisfied was done to bring out the truth. If there be a difference of opinion among you, by arguing the point, any who are in the wrong will be convinced by those who are in the right. It is an absurd thing to suppose the majority ought to decide. Gentlemen, if that were the case, that discussion, which is necessary to the ends of Justice, for the purpose of your coming to a right conclusion, after your having fairly discussed the matter in all its bearings, would seldom happen. Indeed, when the simple question was guilty or not guilty, the majority in the first place would always decide, and the law would be improperly put in force; a difference of opinion in a jury is rather useful for the ends of Justice. If this great crime has been committed, it would be a great scandal indeed if the laws of a civilized country could not punish the delinquents, but allowed them to escape. You will consider the evidence. If it satisfy you any are guilty, you will say so in your verdict; if not, you will undoubtedly pronounce your opinion to be so. You may pronounce some guilty, and acquit the rest, but if you think all are guilty, it will be your painful duty that your verdict should be pronounced against all.

The Jury after retiring about an hour pronounced their

verdict, finding Janees Majaval, Francisco Fereira de Santo Serva, Manuel José Alvez, Florenzo Ribeiro, Juan Francisco, José Maria Martinos, and Antonio Joaquim, GUILTY OF THE WILFUL MURDER OF THOMAS PALMER, by drowning him; and Acquitting Sebastian de Santos, Manuel Antonio, and José Antonio

The learned JUDGE assumed the black cap, and addressed the prisoners as follows: Janees Majaval, Francisco Fereira de Santo Serva, Manuel José Alves, Florenzo Ribeiro, Juan Francisco, José Maria Martinos, Antonio Joaquim, you have been all found guilty after a most careful trial, by the verdict of the Jury, by a Jury who have exhibited feelings which do them high honour, who, notwithstanding the bloody transaction out of which this retribution arises, have dealt with you with every mercy and considerative attention. For your protection they have sifted the evidence and scrutinized the testimony of the witnesses, with that care which their duty called for, and which they have eminently exhibited on this melancholy occasion. Although none of you shed a tear over your victims, they have shed tears over your misfortunes, they are tears, which are honourable to their Christian feelings, but this is not a case for tears; the justice of the country must be vindicated with all its severity, although it will extend to you more time for preparation, than you gave those unfortunate men, whose lives you took. You were engaged in an odious traffic denounced by all the Christian powers of Europe. You were engaged in breaking the law which had been passed between your own nation and this country, and in order to extricate yourselves from the effects of that treaty and that law, you did not flinch at shedding Christian blood. "Whoso sheddeth man's blood, by man shall his blood be shed," and that passage which we shall have in our memory and close to our hearts will be carried out in execution against you all. In dealing in this guilty traffic you might have submitted to the power by which you were captured, but this rebellion against that power amounted to the fact of piracy of itself. The par-

ticular offence, however, of which you are now found guilty, and for which you will suffer, is the deprivation of life, depriving this unhappy young man of his life, by a cowardly wound which was inflicted, a dastardly wound dealt behind upon this poor young man. His blood is rising up for justice, and demands that the ministers of justice should visit your offence with the utmost punishment. The sentence of the Court upon you and each of you is, that for this foul murder, of which you have been respectively found guilty, you be taken from hence to the place from whence you came ; that from thence, at the usual time, you be conveyed to a place of execution, and that there you be hanged by the neck, respectively, until you be dead, and that your bodies be afterwards buried within the walls of the gaol in which you last may have been before you be executed. And during the time that shall elapse between this time and the time of execution, I implore of you to endeavour to make your peace with your God, that he may ultimately have mercy on your guilty souls.

Manning, Serjt. again applied to the learned Judge to reserve the points which had been taken for the prisoners, but his Lordship declined to do so.

Subsequently, however, the points were reserved, as will appear in the case before the Judges in the Exchequer Chamber as follows :—

IN THE EXCHEQUER CHAMBER.

THE QUEEN *v.* SERVA AND OTHERS.

The following were the Judges present:

Lord DENMAN, Lord Chief Justice of the Court of Queen's Bench.

Lord Chief Justice TINDAL.

Lord Chief Baron POLLOCK.

Mr. Baron PARKE.	Mr. Justice MAULE.
Mr. Justice PATTESON.	Mr. Baron ROLFE.
Mr. Baron ALDERSON.	Mr. Justice WIGHTMAN.
Mr. Justice WILLIAMS.	Mr. Justice ERLE.
Mr. Justice COLTMAN.	Mr. Baron PLATT.

Mr. GODSON, Q. C., Mr. COCKBURN, Q. C., Mr. HAYWARD, Q. C., and Mr. POULDEN, appeared for the Admiralty.

Mr. Serjeant MANNING and Mr. COLLIER for the Prisoners.

Manning, Serjt., commenced by complaining that many material parts of the evidence had been omitted in the report of the case laid before their Lordships by the learned Judge who presided at the trial, and also that the case presented the prisoners as convicted on a particular count in the indictment which, in point of fact, had never existed.

The JUDGES, having consulted, decided that it was too late to make any application; that if any such were to be made, a private application to the learned Judge to amend the report would have been the correct course.

Manning, Serjt., then read the case which had been reserved by the learned Judge, which was as follows:—"On the 22nd of February last, the *Felicidade*, a Brazilian schooner, commanded by Joaquim Antonio de Cuqueira, and bound on a voyage from the Brazils to Africa for the purpose of bringing back a cargo of slaves, arrived off the African coast, and on the 26th of that month, while she was hovering within sixteen miles off the shore, and within six degrees, north latitude, was observed by her Majesty's ship of war, the *Wasp*, stationed off the slave coast for the prevention of the slave trade, and then cruising for that purpose near Lagos, off the point of Benin, under the command of Captain Usher, who, upon approaching the *Felicidade*, manned two boats, and gave the command of them to Lieutenant Stupart, one of his officers, with orders to board the *Felicidade*, and if she appeared to be fitted up for the slave trade to capture her.

Lieutenant Stupart, in obedience to those orders, went with the two boats to the *Felicidade*; Cuqueira, the captain, immediately surrendered, and, accompanied by all his crew, except Majaval and three others, were conveyed on board the *Wasp*.

At the time of her capture, the *Felicidade* was fitted for the reception of a cargo of slaves, and was within sixteen miles of the shore. On the 27th of February, between four and five p. m., Captain Usher, having removed from the *Felicidade* the three other men who had been left with Majaval, sent back Cuqueira to the *Felicidade*, manned her with sixteen British seamen, and placed her under the command of Lieutenant Stupart, and directed him to steer a particular course in pursuit of a vessel capable of being seen from the *Wasp*, although then invisible from the *Felicidade*.

Lieutenant Stupart accordingly steered that course, and at day-break the following morning, descried the *Echo*, a Brazilian brigantine, commanded by the prisoner *Serva*. He chased her, and coming up with her at ten o'clock on the following night, fired a pistol as a signal to bring to, got into the jolly-boat, and hoisted the British colours. The captain of

the *Echo* hailed the men in the boat, and asked who they were; and upon being informed that they were English, immediately set sail.

Lieutenant Stupart continued the chase, and overtook the *Echo* at eight o'clock on the next night, within ten miles of the African coast, when and where she lowered her sails and surrendered.

The lieutenant had, at that time, under his command Mr. Thomas Palmer, a midshipman, and sixteen British seamen. He ordered Mr. Palmer, and eight of the seamen to take charge of the *Echo* during the night.

On Mr. Palmer going on board the *Echo*, he found in her the prisoner *Serva*, *Serva's* nephew, twenty-five men, and a cargo consisting of 434 slaves; and by the direction of Lieutenant Stupart (the vessels being at that time close together) he sent *Serva*, his nephew, and eleven of his crew to the *Felicidade*, where they remained during the night in the custody of Lieutenant Stupart. During the chase and at the time of surrender, Lieutenant Stupart wore his uniform, and at the time of the surrender and capture, told *Serva* he was going to take them to her Majesty's ship the *Wasp*, for being engaged in the slave trade.

The *Wasp* had printed instructions on board. Lieutenant Stupart had no printed instructions on board the *Felicidade*, and did not show any other authority than his uniform and the British ensign.

He had however, boarded the *Echo* several times before, and to *Serva* was well known as an officer in her Majesty's navy. The slaves had been shipped on board the *Echo* at Lagos.

At nine in the morning next after the capture, Lieutenant Stupart took with him *Serva's* nephew to the *Echo*, and placed Mr. Palmer and nine British seamen under his command on board the *Felicidade*, in order that he might take charge of her and of *Serva*, Cuqueira, Alvez, Ribeiro, Francisco, Martinos, Joaquim, Santos, Manuel Antonio, José Antonio, and three other of the *Echo's* crew. Within one

hour afterwards, Serva, Majaval, Alvez, Ribeiro, Francisco, Martinos, and Joaquim conspired together to kill all the English on board the *Felicidade* and take her; and in pursuance of that conspiracy rose upon Mr. Palmer and his men, and after a short conflict succeeded in slaughtering them, Majaval having in the course of that conflict stabbed and thrown overboard Mr. Palmer.

Cuqueira, although solicited by Serva to join in the plot, refused to do so, and endeavoured to dissuade him from carrying it into execution.

The counsel for the prisoners insisted that the capture of the *Felicidade* was illegal, that the capture of the *Echo* also was illegal, and that the act of killing the deceased was either justifiable, or amounted to a less offence than murder. And cited *Depardo's case*, Russell & Ryan, C. C. 134. And referred to the Portuguese and Brazilian Treaties, set forth in the 5th Geo. 4, c. 113, and 7 & 8 Geo. 4, c. 74, and particularly the 3rd, 5th, 6th and 7th articles of the Treaty with Portugal, and the 1st, 7th and 8th articles of the Instructions.

I thought that the *Felicidade* was in the lawful custody of her Majesty's officers,—that all on board that vessel were within her Majesty's Admiralty jurisdiction, and that the Jury, if satisfied by the evidence, that the prisoners plotted together to slay all the English on board and run away with the vessel, that in carrying that design into execution, Majaval slew Mr. Palmer by stabbing him and throwing him overboard, and that the other convicted prisoners were present aiding and abetting Majaval in the commission of that act should find them guilty of murder.

Sentence of death was passed on the prisoners, but the execution has been respite until the 24th of November, instant, in order that the opinion of the Judges may be taken as to the propriety OF THE CONVICTION.

He continued, upon this paper to which I am at present confined, I submit to your Lordships that the conviction is wrong upon two grounds.—*First*, that no crime of felony was

committed ; *Secondly*, that if there were, the Court at Exeter had no cognizance of it.

The ground upon which I say that no felony was committed by these prisoners, is, that the two vessels—the *Felicidade* and the *Echo* were wrongfully taken ; but it is sufficient upon that branch of the argument, if I show either one or the other to have been wrongfully taken.

Now, with regard to the capture of the *Felicidade*, how does the case stand ? This vessel had left a port in Brazil. Whether she was a Brazilian vessel did not appear, but she left that port for the purpose of going to the coast of Africa, in order to take in a cargo of slaves.

It does not appear upon this statement, nor was it contended that the *Felicidade* had during that voyage or any other voyage taken any slaves on board, but it did appear she was a vessel having certain decks, which indicated an ability and a preparation to deal in slaves.

Upon what grounds was Lieutenant Stupart justified in taking possession of the *Felicidade* ? It was attempted at the trial to be justified on two grounds. First, it was said that by a treaty between the crown of England and the crown of Brazil, in November, 1826, the offence of dealing in slaves was declared to be piracy ; and then, in the language of the learned Judge, it was lawful for all persons of whatever nation they might be, to hunt down and seize the persons on board the *Felicidade* as pirates.

Now, I take it to be quite clear that a mere declaration between two nations, that a certain act, lawful before a treaty, shall become a crime (whatever description be given to that crime) is not binding upon the individuals of the respective nations, until made obligatory by some municipal law.

In this country there existed, at the time of this treaty, a municipal law, an act of Parliament passed in the fifth year of the reign of George the Fourth, by which slave trading, carried on by British subjects, was declared to be piracy.

That slave trading, which is made piracy by the 5 Geo. 4,

is actually having taken slaves on board. The 2nd section of 5 Geo. 4, c. 113, runs thus, "It shall not be lawful, except in such special cases as are hereinafter mentioned, for any person to deal or trade in, purchase, sell, barter, or transfer, or to contract for the dealing or trading in the purchase, sale, barter, or transfer of slaves or persons intended to be dealt with as slaves, or to carry away or remove, or to contract for the carrying away or removing of slaves or other persons as or in order to their being dealt with as slaves, or to import or bring or to contract for the importing or bringing into any place whatsoever slaves or other persons so or in order to their being dealt with as slaves; or to ship, tranship, embark, receive, detain, or confine on board, or to contract for the shipping, transshipping, embarking, receiving, detaining or confining on board of any ship, vessel or boat, slaves or other persons, for the purpose of their being carried away or received or in order to their being dealt with as slaves, or to ship, tranship, embark, receive, detain or confine on board, or to contract for the shipping, transshipping, embarking, receiving, detaining or confining on board of any ship, vessel or boat, slaves or other persons, for the purpose of their being imported or brought into any place whatsoever, so or in order to their being dealt with as slaves, or to fit out, man, navigate, equip, despatch, use, employ, let, or to take to freight or on hire, or to contract for fitting out, manning, navigating, equipping, despatching, using, employing, letting or taking to freight or on hire any ship, vessel or boat, in order to accomplish any of the objects or the contracts in relation of the objects, which objects and contracts have been hereinbefore declared unlawful."

Then it goes on to provide against shipping of goods for the purpose of slave trading, or the insurance of slave adventures. Then the 9th section declares what shall be piracy in respect of the slave trade. It enacts, "that if any subject or subjects of his Majesty, or any person or persons residing or being within any of the dominions, forts, settlements, factories or territories

now or hereafter belonging to his Majesty, or being in his Majesty's occupation or possession, or under the government of the United Company of Merchants of England trading to the East Indies, shall, (except in such cases as are in and by this act permitted after the 1st day of January, 1825, upon the high seas, or in any river, creek or place where the admiral has jurisdiction, knowingly and wilfully carry away, convey or remove or aid and assist in carrying away, conveying or removing any person or persons as a slave or slaves, or for the purpose of his, her, or their being imported or brought as a slave or slaves into any island, colony, country, territory or place whatsoever, or for the purpose of his, her, or their being sold, transferred, used or dealt with as a slave or slaves, or shall after the said 1st day of January, 1825, except in such cases as are in and by this act permitted upon the high seas or within the jurisdiction aforesaid, knowingly and wilfully ship, embark, receive, detain or confine, or assist in shipping, embarking, receiving, detaining or confining on board any ship, vessel or boat any person or persons for the purpose of his, her, or their being carried away, conveyed or removed as a slave or slaves, or for the purpose of his, her, or their being imported or brought as a slave or slaves into any island, colony, country, territory or place whatsoever, or for the purpose of his, her, or their being sold, transported, used or dealt with as a slave or slaves, then and in every such case the person or persons so offending shall be deemed and adjudged guilty of piracy, felony and robbery, and being convicted thereof, shall suffer death without benefit of clergy."

So, although the first section of the statute prohibits a variety of acts—yet when the penalties in respect of those acts come to be applied, only the graver act, the actual trading in slaves, the actual removing and carrying away of slaves, is made *piracy*; but the statute does not stop there. It does not omit to provide a punishment for the minor offences which are denounced in the second section. It goes on in the tenth section

to make certain acts punishable by transportation for fourteen years, and amongst those acts is that of all those persons "who shall fit out, man, navigate, equip, use, employ, let, or take to freight or on hire, or contract for the fitting out, manning, navigating, equipping, despatching, using, employing, letting, or taking to freight, or on hire, any ship, vessel, or boat, in order to accomplish any of the objects, or the contract in relation to the objects, which objects and contracts have been hereinbefore declared unlawful." And that is the only clause in this statute which prescribes the penalty for persons who have not actually removed slaves, carried or conveyed, which are the words of the tenth section, and also of the second section—this is the only clause which provides for the minor offence of having fitted out, or been concerned in the fitting out of a vessel, for the purpose of carrying out any of the objects prohibited by the act. So that at the time this treaty between Brazil and England took place, the state of the law in England was this, that persons actually engaged in the slave trade, so far as to have carried or conveyed slaves or persons for the purpose of making them slaves, were guilty of piracy and punishable with death: but persons who had fitted out vessels for the purpose of the slave trade, which was the case with regard to the *Felicidade*, were declared guilty of felony, and punishable by transportation, not exceeding fourteen years, and not less than seven, or with imprisonment for not less than three, or more than five years. That being the state of the law of England by an act passed two years before,—a treaty takes place between Brazil and England, in the first article of which it is declared, that trading in slaves by the subjects of either power, shall be deemed piracy.

The treaty of 23rd November, 1826, is recited in these words in 7 & 8 Geo. 4, c. 74.

"Whereas, a convention was concluded between his Majesty and his Majesty the Emperor of Brazil, for the regulation and final abolition of the slave trade, so far as relates to the dominions and subjects of the Brazilian empire, and signed at

Rio de Janeiro, on the 23rd day of November, 1826. And whereas, by the first article of the said convention, it was agreed upon and concluded between the high contracting parties, that at the expiration of three years to be reckoned from the exchange of the ratification of the present treaty, it should not be lawful for the subjects of the Emperor of Brazil, to be concerned in the carrying on of the African slave trade, under any pretext or in any manner whatever; and that the carrying on of such trade after that by any person subject of his Imperial Majesty, should be deemed and treated as piracy. And whereas by the second article of the said convention, his Majesty and his Majesty the Emperor of Brazils, deeming it necessary to declare the engagement by which they hold themselves to provide for the regulation of the said trade, till the time of its final abolition, did mutually agree to adopt and renew as effectually as if the same were inserted word for word in the said convention, the several articles and provisions of the treaties concluded between his Majesty and the King of Portugal on this subject on the 22nd day of January 1815, and on the 28th day of July 1817, and the several explanatory articles which have been added thereto; and, by the third article of the said convention, the high contracting parties further agreed that all the matters and things contained in those treaties, together with the instructions, and regulations, and forms of instruments annexed to the treaty of the 28th of July 1817, should be applied, *mutatis mutandis*, to the said contracting parties and their subjects as effectually as if they were recited word for word, therein confirming and approving thereby all matters and things done by their respective subjects under the said treaties and in execution thereof. And, by the fourth article of the said convention, for the execution of the purposes of the said convention, the said high contracting parties further agreed to appoint forthwith mixed commissions." So that this treaty is recited by this Act of Parliament with perfect correctness, and contains in the first article of it a provision that the trading and being

concerned in the slave trade shall be unlawful, and that persons actually trading shall be deemed pirates; and then it contains these further provisions.

POLLOCK, C. B.—It will be short to state it, that the treaty of Portugal is taken up by the Brazilian Emperor, and the statute of 7 & 8 Geo. 4 takes up 5 Geo. 4, with respect to all the matters in that Act, so you have nothing to do but refer to 5 Geo. 4.

Manning, Serjt.—Just so; and in the 5 Geo. 4, the treaty of Portugal is set out, and not only that, but those additional articles and the instructions, which I shall rely upon in another part of my case. Then, with regard to the first branch of the argument, viz. that the seizure was improper on the mere ground that the persons on board the *Felicidade* were pirates, and, as described by the learned Judge at the trial, enemies of the human race.

ALDERSON, B.—I should like to know on what point you mean to argue that no crime of felony was committed. I don't wish you to give me the argument but the point.

Manning, Serjt.—I say that no crime in the nature of felony was committed, because these persons were in unlawful imprisonment at the time they rose upon their captors, and that they were unlawfully imprisoned on two grounds, viz. that the *Felicidade* was unlawfully taken by Lieutenant Stupart in the boats of the *Wasp*, and also that the *Echo*, from whence they were taken, was unlawfully captured by the *Felicidade*.

ERLE, J.—Then you are arguing that the *Felicidade* had been unlawfully taken, that is the point you are now upon?

Manning, Serjt.—Yes. The capture of the *Felicidade* was attempted to be supported at the trial on two grounds. First, that independently of the right of capture given by the treaty, these persons were pirates, *hostes humani generis*, and therefore properly hunted down, seized, and destroyed, by any person who chose to take the task upon himself, and that was supported upon the ground that, by this treaty

between England and Brazil, the offence of slave trading was declared to be piracy; and then it was contended and so ruled by the learned Judge, that the offence of slave trading was complete upon going upon a voyage for the purpose of taking on board slaves.

With reference to the first proposition, I say that such is not the meaning of the treaty, and I show that it is not by the language of the English legislature shortly before, and language corresponding in effect introduced into the treaty. But I take a higher ground: supposing the treaty had expressly stated, in the terms of the tenth section of the statute of the 5 Geo. 4, that all attempts to deal in slaves should be piracy, that would not have been binding upon the subjects of Brazil. If, after that treaty, a Brazilian subject had carried on the slave trade, that would have been a grievance against England, for which the English Ambassador at Rio de Janeiro might have remonstrated, and which he might have made a *casus belli*, if the persons had not been punished (and punished they could not be, unless there was a Brazilian law making them punishable), or if redress had not been made; but no declaration in a treaty between two nations that a certain crime shall be piracy, will make it such as against the subjects of those nations.

POLLOCK, C. B. — Why should you be arguing on the fringe of the case, when expressly by the sixth article it is provided that no British or Portuguese cruiser shall detain any slave ships not having any slaves on board?

Manning, Serjt. — I did not choose to rest upon that, because it was contended on the other side, and ruled by the learned Judge at the trial, that that clause was merely directory and not essential, and that, though the parties might be amenable to the Admiralty for violating it, the capture was still good. Therefore, I will go on to show that until the Legislatures of the respective countries had made some enactment corresponding with that provision in the treaty, the acts of a subject of either country, in contravention of that treaty, would be matter of remonstrance between the two countries,

but would be no crime as affecting the party himself. Was it ever heard, that a person here could be indicted, not for an offence at common law, or *contra formam statuti*, but against the form of some treaty? Suppose the treaty had provided that the subjects of either Government, *preparing* vessels for the slave trade, should be guilty of piracy, would that have the effect of altering the English Act of Parliament, and making that piracy punishable with death which the Legislature had declared to be felony, punishable by not more than fourteen years transportation? In some remarkable instances, certain acts have been declared to be piracy by a nation, which it is quite clear no other nation could treat as such. In 1570, an edict was published by Philip II., of Spain, for the government of his subjects in the Low Countries, when it was declared that all persons guilty of fraud in making insurances upon vessels should be deemed pirates. In 1580, the same prince issued another edict, which is still stronger. It appeared that the inhabitants on the coast of Flanders derived their subsistence, in a great measure, from the herring-fishery, and that persons, either from mischief or for the sake of profit had cut their nets on the shore; this decree of Philip II. declares that all persons who shall cut the nets of persons employed in the herring-fishery shall be deemed pirates. *Binkershoek*, vol. 5, book 1, c. 17, p. 123. *Questiones Juris Publici*.

Then it was contended, that by the treaty itself between these nations, there was an authority to seize this vessel, and that argument was not founded upon any express words of the treaty, but upon the general scope of the treaty, and upon a practice which had obtained under it.

The second and third articles of the treaty of the 23rd November, 1826, between England and Brazil, expressly recognise the provisions of the treaty of 1817, between England and Portugal, the terms of which are set out in the act of 5 Geo. 4: the treaty not only declares that the terms of the treaty of 1817 shall be considered as incorporated, but it goes on in another distinct section to say, that all the

additions to that treaty, and instructions appended to it shall also be incorporated. These instructions say, "Ships, on board of which no slaves shall be found, intended for the purposes of traffic, shall not be detained on any account or pretence whatsoever." Inst. Art. 1.

PARKE, B.—May I ask whether the treaty with Brazil of the 27th July, 1835, which authorizes the condemnation of vessels equipped for the purposes of slave trade, was put in evidence?

Mr. Godson.—I believe that was not ratified.

Manning, Serjt.—It was not put in, and therefore, is out of the case. Then, here is a declaration in article 1, of the Instructions, in words as express as the English language affords, prohibiting the detention on any account or pretence whatever of a vessel not having slaves on board for the purposes of traffic. This clause is introduced for the purpose of preventing the capture of vessels, which were fitted out for the slave trade, but had no slaves on board. There is a great difference between essential clauses in a statute and clauses which are directory only, and the distinction between the two is pointed out in Dwarries on *Statutes*, 2nd vol, page 718, "beyond all contest, where the words are in the negative no question can arise as to their being essential."

It appears then that the *Felicidade* was wrongfully captured and being wrongfully captured, she remained a Brazilian and a foreign vessel to all intents and purposes, as if that wrongful act had not taken place.

It was argued, that supposing the *Felicidade* to have been wrongfully captured, yet, inasmuch as she was in fact captured, she became British property, the sovereignty of the Queen of England was established in her, and the persons on board her *volentes*, *volentes* were subjects of the British Crown, and bound by a temporary allegiance to observe the laws of England. So that if an English vessel, after taking on board a cargo of oil in the Neapolitan territory, and proceeding for the purpose of discharging that cargo at Hull

for the use of the Yorkshire clothiers, had been seized on the coast of Spain by a vessel, (which chose, either innocently or wilfully, to say this was not a vessel from Naples, but from Gibraltar, intending to smuggle goods into Spain, which is frequently done), and had been taken possession of by a Spaniard, from the moment of the seizure of that vessel (not to call it a capture), every Englishman on board her would owe allegiance to the Queen of Spain, and would be bound to observe the laws of Spain; so that, if before the abolition of the Inquisition, the captain of the vessel had chosen to ask any of these Englishmen whether he believed in any particular article disclaimed by Protestants, and that Englishman had said he did not believe it, he might have been legally burnt. What would Admiral Blake have said to such a doctrine as that, and what would Cromwell have said?

ALDERSON, B.—The question is, what Judges would say to it, and not what admirals would say to it.

Manning, Serjt.—Can it seriously be contended that the crew of a vessel taken possession of however wrongfully by the subjects of another country, become, *ipso facto* by that seizure amenable to the laws of that country, bound to know them, and punishable for disobedience to them? And yet that is the ground by which this conviction is attempted to be supported. Then the *Felicidade* was wrongfully captured, was piratically captured, because the person who takes a vessel belonging to a friendly power without any lawful authority is a pirate.

ALDERSON, B.—Surely that is not so. If a person meaning to do that which is right, makes a mistake in the capture of a vessel, he is not a pirate; surely you lay that down rather strong. The question is the *bond fides*.

Manning, Serjt.—There is another objection to the capture of the *Felicidade*: the learned Judge has reported that the *Wasp*, by whose boats the *Felicidade* was captured, had instructions on board. It does not appear what those instruc-

tions are, they were in Court, and do in terms authorize the detention of a vessel fitted out for the slave trade.

ALDERSON, B.—Those were in evidence I presume?

Mr. Godson.—Yes, they were in evidence, I handed them to my learned friend, and he made use of them.

Manning, Serjt.—Yes, they were considered in evidence.

The argument stands thus, the treaty requires that there shall be instructions on board the cruiser, which shall prohibit the persons on board that cruiser from taking vessels in which no slaves are actually found; but the book actually put on board the Wasp, although it does contain these instructions, also contains an instruction negating them: that part of the instructions, by which cruisers are directed to take vessels fitted out for the slave trade, is printed and given to them as part of their instructions upon which they are to act; whereas the instructions which are subjoined to the treaty of 1817, are merely printed in an appendix to which they may or may not refer; but what may be called the enacting and directing and governing part of the instructions, contains a clause which is in violation of the provisions and the instructions contained in the treaty of Portugal of 1817, and in the treaty with Brazil of 1826.

The 5th Article of the treaty of 1817, contains the same provisions as the 1st Article of the instructions, "The two high contracting powers for the more complete attainment of their object, viz., the prevention of all illicit traffic in slaves on the part of their respective subjects, mutually consent that the ships of war of their royal navies, which shall be provided with special instructions for this purpose as hereinafter is provided, may visit such merchant vessels of the two nations as may be suspected upon reasonable grounds of having slaves on board, acquired by an illicit traffic, *and in the event only of their actually finding slaves on board*, may detain and bring away such vessels in order that they may be brought to trial before the tribunals established for this purpose, as shall hereinafter be specified."

PLATT, B.—Mr. *Godson*, I don't remember any instructions being given in evidence. They certainly were not read by the officer.

[After some discussion, whether or not the instructions were to be considered in evidence, it was finally agreed that they should be.]

ALDERSON, B.—The argument is just the same, whether they are in or not.

Manning, Serjt.—Either the new instructions are in evidence or they are not, if they are, it amounts to this: that our Government authorised a violation of the treaty, if not, Lieutenant Stupart himself acted in violation of it. Therefore the objections to the capture of the *Felicidade* are, that there were no slaves on board, and that the *Wasp* was not furnished with proper instructions.

POLLOCK, C. B.—Your argument is, that she did not lose her nationality by the seizure under these circumstances.

Manning, Serjt.—Just so, my Lord.

POLLOCK, C. B.—Therefore, the Brazilian subjects on board the vessel never became amenable to the British law.

Manning, Serjt.—Exactly so.

ALDERSON, B.—And granting there was a murder, it is against the peace of the Brazilian law, and not the English law.

Manning, Serjt.—I think I have proved something more: if this was an unlawful capture, they were at liberty to recapture their vessel by any means open to them.

I proceed to show that the *Echo* was wrongfully captured. It is stated that the *Echo* was taken by the *Felicidade* after her capture. Now, the treaty between the two governments provides, there shall be no detention, or visit, or search of any vessel except by a vessel belonging to the royal navy of the Sovereign whose subjects make the search, neither shall that search be conducted by a person of less rank than a lieutenant in the navy.

It was contended, in order to show that this was a capture

by a British vessel, that the *Felicidade* by her capture became a British vessel; and that, therefore, the capture by her was a capture by a vessel of the royal navy of Great Britain; and the learned Judge ruled that having been captured by the *Wasp*, and being manned by persons who previously formed part of the crew, she might be considered a boat of the *Wasp*. There was a decision of Lord *Stowell*, in a case somewhat analogous to that.

ALDERSON, B.—Suppose these persons had been brought on board her Majesty's ship *Wasp*, and then had conspired and killed the persons on board the *Wasp*, do you mean to say they would not be guilty of murder?

Manning, Serjt.—Yes; I should say that, if being wrongfully imprisoned on board the *Wasp*, that was necessary to effect their liberation. In 5 Rob. Adm. Rep. page 41, is the case of *The Melomane*. The marginal note is this—"Capture by a cutter fitted out by the captain of a man-of-war as a tender, and manned from his ship, but without a commission or authority from the Admiralty, will not enure to the benefit of the King's ship."

That was a much stronger case than this—there the cutter, an English vessel, a tender to a King's ship, and manned by a crew from the King's ship, effected the capture; but it was decided not to be a capture by the King's ship, and therefore it became a droit of the Admiralty.

There is this peculiarity in the present case, which does not exist in the case of *The Melomane*, that it is expressly provided by the treaty there shall be no change of property in the subject until there has been a condemnation at Sierra Leone; so that if the capture had been ever so legal, it could not form part of the British navy until it had been condemned at Sierra Leone under the Mixed Commission, and it is quite clear this vessel could not be considered part of the navy of Great Britain.

In the judgment these words occur:—"Surely it is not to be maintained that an officer by putting his men on board,

can constitute a ship to be a part of the navy of Great Britain? Such a character is not in my opinion to be impressed without the intervention of some public authority." The *Felicidade* never was condemned, for she was lost on her way to Sierra Leone; but even if she had been condemned afterwards, the condemnation would have had no retrospective operation.

Another defect in the capture of the *Echo*, which does not exist with regard to the *Felicidade* is this, the capture of slaving vessels is to be made only by officers of the navy not under the rank of lieutenant, as appears in Article 7 of the Instructions.

The search of the *Echo* was not made by Lieutenant Stupart, who was a qualified person, but by Mr. Palmer, a midshipman, who was not qualified; but at the trial it became unnecessary to decide that point, because the learned Judge ruled that this clause was directory only, and not essential. It was asked by the Crown, if the search was not made in a mild manner according to the instructions, would the capture be bad? It would not. The act contains clauses which are essential, and clauses which are directory.

The lieutenant did not go on board till the next morning. The vessels were so close that the witness said he was afraid of their running foul of one another in the night, they were within hail, but when it is said that in no case shall a search be made by an officer holding a rank inferior to that of lieutenant, it is not sufficient that a lieutenant may stand on the deck of another vessel, while the search is being made by one who goes on board; otherwise it might be said the search was made by Captain Usher, the captain of the *Wasp*, who deputed this vessel, and indeed, it was at one time contended that this might be considered as a search by Captain Usher.

It appears, upon the learned Judge's report, that a vessel had been descried from the topmast of the *Wasp*, which was discernible there, but not discernible from the *Felicidade*, which was a lower vessel; and then afterwards Captain Usher directed Lieutenant Stupart to sail in a particular course. It is not stated, nor was there any evidence that the vessel seen

from the mast-head of the *Wasp*, was the vessel afterwards fallen in with by Lieutenant Stupart; there may have been other vessels cruising in the same direction, and for the same purpose.

How could the persons on board the *Echo* surmise that a Brazilian vessel, of Brazilian build, and fitted out for slaves, belonged to the royal navy of Great Britain? This shows the importance of a rigorous adhesion to the terms of the treaty. There was nothing to inform the persons on board the *Echo* that Palmer was a vice-lieutenant on this occasion, or that the vessel from which he came was a vessel belonging to the royal navy of Great Britain.

TINDAL, C. J.—Did it appear that a flag was flying on board?

Manning, Serjt.—No; there was a flag on board, but not flying. It was a small ensign in a boat behind the vessel. The capture took place after night. An American vessel belonging to Chili, or a vessel belonging to Buenos Ayres, or any other country, may have gone to Brazil, and touched there, and then proceeded to the coast of Africa, and can it be contended that the mere circumstance of a vessel touching at a port in Brazil will make the crew Brazilian subjects? Supposing again, for the moment, the *Felicidade* had by this capture on the part of Lieutenant Stupart, either rightful or wrongful become, without condemnation, part of the British navy, it is stated in the case that the *Felicidade* had no instructions whatever on board.

ALDERSON, B.—And she was not in sight of the *Wasp*?

Manning, Serjt.—She did not make the capture till the next day, nor was she despatched by the *Wasp* in search of this particular vessel. It is quite clear, if she had met any other vessel than the *Echo*, she would have taken that with the same authority with which she took the *Echo*, and therefore it must be a capture by the *Felicidade* under a general authority from Captain Usher, but not a capture by the *Wasp*. That being so, the language of the treaty is violated

which requires that the captain in the vessel shall have on board the instructions annexed to the treaty.

If it has been established either that the capture of the *Felicidade*, or of the *Echo* was unlawful, there can be no difference made between such a case and a French vessel, in the English channel, choosing to take (*bond fide*, we may suppose) English fishermen suspected of an intention to smuggle on the French coast. Fishermen, so unlawfully detained, would have a right to liberate themselves, and would not be bound to wait the decision of a French tribunal of law to which they are total strangers, of the redress to be expected from which, they have no means of forming any opinion. The degree of duress would be immaterial, whether they were confined below, or put under hatches, or in irons; in either case they would have a right to liberate themselves, and also to retake possession of the property of which they had been wrongfully deprived.

If Majaval was justified in regaining possession of his ship, he had a right to use as many persons as were necessary for the purpose of assisting him, and if he was justified, the others would be justified. Therefore, these persons were, in respect of the unlawful capture of the *Felicidade* and the *Echo*, or of one of them, justified in the part which they took on this occasion, it being quite clear that no means short of those which they adopted could have attained the liberation of their own persons, or the repossession of their own ship. It is possible, if they had waited for the vessel being brought to Sierra Leone, they might have obtained redress, but they were not bound to wait for that if they were wrongfully detained. If there was no ground for subjecting them to the jurisdiction of the Court of Sierra Leone, there is no ground for saying they were bound to wait for the decision of that Court.

ALDERSON, B.—It is a great point for you to make, that it was necessary to murder every body in order to attain their object. It is not found it was necessary at all to do so.

Manning, Serjt.—The only inquiry here is the death of Mr. Palmer, the indictment has nothing to do with the death of the others. Palmer is the person who commanded, and he

is the person whom these persons are convicted of having killed; and whatever considerations may arise as to the necessity of killing any other person—they do not arise here.

Atkinson, B.—Every body was killed.

Manning, Serjt.—Yes.

Parke, B.—Go on with your argument.

Manning, Serjt.—A necessity for violence is shown; and no excess of violence is shown. Supposing a merchantman is taken by a privateer in time of war, and the crew of the merchantman being on board the privateer, seize an opportunity of rising upon the crew of the privateer and throw them overboard, would that be considered as a criminal act? If so, a great many public societies in this country ought to be indicted for misdemeanors, in giving public rewards to the crews of vessels who have so conducted themselves. These men have done nothing but what the crews of English merchantmen in time of war have done when they have had an opportunity of rising upon their captors. There is nothing here to distinguish this case against the prisoners from that of the crew of the merchantman rising upon the crew of the privateer which has captured them. In the latter case, indeed, there is this distinction, that the capture of an English merchantman by a French privateer in time of war is a lawful capture. Whereas the capture of the *Echo* and *Felicidade* in time of peace is an unlawful capture. And, therefore, if it is justifiable and praiseworthy in the crew of a merchant vessel to rise upon the crew of a privateer, *a multo fortiori*, it would be commendable on the part of the crew of a vessel who are unlawfully taken to rise upon, and, if necessary, to destroy their captors.

The second branch of my argument is, that, even if criminality amounting to felony or to murder had been established against the prisoners, yet that they were not amenable to the laws of this country.

It is quite clear that a foreigner committing a crime in a foreign country is not amenable to the laws of this country.

If a Frenchman kills another, or an Englishman in Paris

and escapes to this country, he cannot be tried here for the offence so committed; there may be a convention between the two countries for the surrender of prisoners, but that is not in the nature of punishment, but a proceeding with a view of restoring the parties to the jurisdiction of their natural country.

ALDENSON, B.—To try them in the original country.

Manning, Serjt.—Yes, it is a restoration of jurisdiction to their natural judges. If these parties committed an offence in Rio de Janeiro they could not be tried here for it, nor if they committed any offence in a Brazilian vessel. Supposing, before this capture of the *Felicidade* by Lieutenant Stupart, there had been a fray on board the *Felicidade*, and one of the crew killed another, and the party committing the offence had afterwards casually found his way to this country, he could not be tried for it. Not even if an Englishman were killed—the Brazilian vessel was Brazilian land for this purpose. Then, how has this Brazilian bottom ceased to be Brazilian land? It never has ceased. If the capture of the *Felicidade* was wrongful, the mere tortious act of a stranger cannot alter the property in a vessel, still less can it alter the nationality of a vessel; but I will go further and say, supposing it to have been rightly captured, its nationality continues, at least until condemnation, by the Court at Sierra Leone. Here the vessel had not been condemned at the time this transaction took place, and never was in fact condemned, because she was lost on her passage to Sierra Leone; so if there were any possibility of saying that the condemnation would have relation to the act causing condemnation, that relation does not take place here. Not that a party would be made guilty of an offence by relation, if it were not an offence at the time the act was done. If it should be said that any objection to the jurisdiction should have been taken by a plea in abatement, that is answered by the case of the *King v. Johnson*.

Mr. Godson.—That is not contended.

Manning, Serjt.—Then there was a total absence of jurisdic-

tion. The case most in point is, *Rex v. Depardo*, (4 Taunt. 26). Depardo was tried and convicted at the Old Bailey on the 30th of October, 1807, before Lord *Ellenborough* and Mr. Baron *Thompson*, under a special commission issued by virtue of the statutes 33 Hen. 8, c. 23, and 43 Geo. 3, c. 113, s. 6, upon an indictment for feloniously killing and slaying William Burne, at Canton, in China, in parts beyond the seas without England. At the trial it was proved, that the deceased was an Englishman, and a marine belonging to the Alnwick Castle, a ship in the service of the East India Company, having letters of marque. That the prisoner Depardo was a Spaniard, and had been a prisoner of war on board his Majesty's ship the *Blenheim*, that two or three months before he committed the offence he entered as a volunteer on board the Alnwick Castle, at Peelopelang, or Prince of Wales' Island, which is under the dominion of his Majesty, and received the usual bounty, and also that on the day before the perpetration of the act, he received some part of his pay; that at the time of committing the offence, he was one of the crew of the Alnwick Castle, which was then lying near Canton, in a part of the Canton River, above one-third of a mile in width within the tide way, at a distance of about eighty miles from the sea, that the prisoner went on shore with others of the crew, and there mortally wounded the deceased, who was afterwards carried on board the ship, where he died on the following day.—Depardo was not a person forcibly brought on board an English vessel, he was there by his own consent; the wound was inflicted upon Burne, the person killed, on shore at Canton; but the death took place on *board* the vessel to which they both belonged; the material part of the transaction is the *place* where the death occurs, and although the party may be indicted both where the *blow* is given and where the *death* takes place, yet formerly it was otherwise, and a party could only be indicted where the *death* took place: this is an authority *a multo fortiori*, in favour of the non-liability of the parties here to be amenable to the Criminal Courts of this country. It is possible that an

authority may be produced against me which certainly does exist in history, namely, that Buonaparte declared all vessels which touched an English port were to be considered as English vessels, and liable to all the consequences of being English vessels: but that I apprehend is a case rather to be *reprobated* than to be followed.

The case of *Azzopardi*, (2 Mood. C. C. 288), is this:—The prisoner was tried before Mr. Baron Gurney at the Central Criminal Court, under a special commission, and convicted of murder—the indictment was founded upon the statute of 9 Geo. 4, c. 31, s. 7, for the trial of any of her Majesty's subjects who shall be charged in England with any murder or manslaughter, committed on land out of the United Kingdom, whether within the King's dominions or without. The murder was committed at Smyrna—the prisoner, a native of Malta, of the age of about twenty-one, was residing at Smyrna, under a passport from the governor of Malta—the person murdered was a Dutch woman—proof was given that Malta was part of her Majesty's dominions. Mr. Ballantine for the prisoner at the close of the evidence for the prosecution, submitted that it was necessary that the person alleged to be murdered should be a British subject. Here it was held, that as the statute applies to offences committed by British subjects, it was within the statute, and the party being a British subject was bound by British statutes, and therefore the Court had *conusance* merely on the express ground of the party being a British subject, and being amenable to the British Courts by virtue of those Acts of Parliament.

POLLOCK, C. B.—It was held the object of the statute was to restrain the crimes of British subjects in every part of the world.

Manning, Serjt.—Certainly.

POLLOCK, C. B.—It has nothing to do with the present case.

Manning, Serjt.—I only cite it because it was mentioned at the trial. In conclusion, this offence, if offence it be, in point

law, is an offence committed by foreigners in a foreign vessel, which had not lost its *nationality*, either in fact or in law, and is therefore not cognizable in a British Court of Justice. This conviction therefore cannot be sustained.

Mr. Collier.—(For Serva, Alves, and Majaval.) *First*, these prisoners are not triable in this country; *secondly*, their offence amounts to less than murder.

No person is, under any circumstances, triable by the laws of this country, who does not owe allegiance to our Sovereign; and no person owes allegiance to our Sovereign, who has not by some act of his own, consented expressly or impliedly to accept the protection of our laws.

In *Calvin's case*, (7 Rep. p. 1), allegiance is said to be of four kinds—first, that which is due from a natural born subject, *ligeantia naturalis*; second, that which is due from a naturalized subject, *ligeantia acquisita*; and thirdly, *ligeantia localis*, a local or transitory allegiance which is due from any person who cometh into this country. The fourth is *ligeantia legalis*—or allegiance sworn after a manner prescribed by our municipal law, not to the present purpose.

The principle on which any person who “cometh” into this country, becomes subject to our laws is this, that the law implies on behalf of any person coming into our territory, from which we could exclude him and in which we protect him, a social compact with us, founded on a due consideration, by virtue of which he undertakes to obey our laws.

This principle is laid down in all the best writers on the law of nations. Grotius says—“Qui in aliquo loco contrahit subditus temporaneus legibus loci subjicitur, . . . ratio est quia ad gubernationem populi moraliter necessarium est, ut qui populo vel ad tempus se admiscant, ii conformes se reddant ejus populi institutis.” (*Grot. Lib. 2, c. 2, n. 5*).

“Pro subjectis imperii habendi sunt omnes qui intra fines reperiuntur, sive in perpetuum sive ad tempus commorantur.”

Huberus de conflictu legum. (*Lib. i., tit. iiii axiom 2*).

The same doctrine is laid down in *Story's Conflict of Laws*, p. 287—"In regard to foreigners resident in a country, although some jurists deny the right of a nation generally to legislate over them, it would seem clear upon general principles of international law, that such a right does exist, and the extent to which it should be carried is a matter purely of municipal arrangement and policy." In Vattel, (Chitty's Ed., p. 172), it is said—"Even in those countries which every foreigner may freely enter, the Sovereign is supposed to allow him access only on this tacit condition, that he will be subject to the laws . . . in virtue of this submission, foreigners, who commit faults are to be punished according to the laws of the country."

Lord Coke's definition of murder at common law is—"The killing of any reasonable being within some county of the realm by a person of sound mind, &c."—but this definition of murder must be taken to apply only to persons in this country who owe allegiance to our Sovereign; and the mere fact of a person being in this country, although *prima facie* evidence that he has consented to owe allegiance, is not conclusive. Lord Coke says, in *Calvin's case*, it was held that Perkin Warbeck was not triable for high treason, although taken here in the act of conspiring against the life of the King, because the indictment could not conclude "*contra ligeantiam suam debitam*"—that allegation being material: for Perkin Warbeck, although within this country, yet having come as an alien enemy in arms, was not to be assumed to owe any allegiance to the King. It is also said in the same case—"If an enemy were to take one of our towns and establish a colony there, persons born in that colony, although within this country, would not owe allegiance;" and consequently, they would not be triable by our laws.

The jurisdiction of the Court of Admiralty, has from time out of mind extended beyond the limits of this country; and whatever jurisdiction the Court of Admiralty had, is admitted to have been transferred by various statutes, first to the Central

Criminal Court, and from thence to Judges of Assize. But this jurisdiction cannot be considered to apply to any person on the high seas, who does not owe allegiance to the Queen. To assume this would be to assume that we have passed statutes recognising a jurisdiction which is in contravention of the law of nations, in as far as it infringes on that jurisdiction which every state of right possesses over its own subjects; and of the first principles of justice on which all laws are founded, in as far as it is manifestly unjust, to subject a man to laws from which he has never consented to accept protection, and of which he cannot by any construction be supposed cognizant.

It is said by Montesquieu, that the laws of a country are framed with reference to its nature, and its principle: its nature being that which constitutes it, and its principle that which sustains it. They are framed with reference to its climate, (for there are certain acts which ought to be offences in one climate, and which ought not to be in another); they are framed with reference to its soil, to its institutions, to its ideas, to its manners and customs: to try a foreigner by laws which he has never heard of, the reason of which he possibly cannot comprehend, must be unjust, unless he have done that which the law may reasonably construe as constituting a social compact between him and the state, by virtue of which he accepts its protection, and in return promises to abide by its laws. A forced protection imposed upon him without his consent, and never expressly or impliedly accepted by him, cannot be a consideration on which such a compact can be based. For example—with reference to the injustice of trying the subjects of one country by the laws of another;—it would clearly be unjust to try persons educated in the Brazils, for carrying on the slave trade, by the laws of this country. We are educated to abhor slavery from our infancy; in that country it is tolerated and defended by the government, by the clergy, and by public opinion: there is no sentiment opposed to it, nothing to inform an uneducated person that the African has the rights of a man,

or that he is not a mere transferrable chattel, the legitimate subject of traffic.

The next question is ;—what constitutes allegiance on the high seas? Extending the principle, on which a man who comes into this country is presumed to owe local allegiance—those persons only on the high seas owe allegiance who come by their consent, express or implied, on board an English ship.

ALDERSON, B.—A prisoner of war may murder the captain then? He does not come voluntarily.

Mr. Collier.—A person comes voluntarily, by construction, on board one of our ships, who is taken in pursuance of a treaty to which he has assented; with regard to the case of a prisoner of war, it may be said that on engaging in war, he has consented to abide by its laws: that by the laws of war his life is forfeited to the victor, and the receiving his life is a certain consideration for a social compact between him and the State which spares and maintains him; if a prisoner of war is of right triable for an offence committed on board an English ship, or in this country, by other than military law (which is not admitted), it must be on this principle.

The case of *Rex v. Depardo*, rather tends to show that a prisoner of war is not triable for an offence committed on board an English vessel abroad.

ALDERSON, B.—The offence there was not on board the ship.

POLLOCK, C. B.—It was committed on shore.

Mr. Collier.—But the man died on board.

ALDERSON, B.—The stroke was given in China.

Mr. Collier.—In the case of *Rex v. De Mattos*, 7 C. & P., it was held that De Mattos was not indictable under the 9 Geo. 4, for the murder of a person on shore, because that person died on board ship, though the blow was given on shore.

POLLOCK, C. B.—There was once a doubt if the stroke was in one country, and the death in another, whether the offender could be tried in either country.

Mr. Collier.—Depardo was tried under a commission issued under the 33 Hen. 8, c. 23, by which a special commission was instituted to inquire into certain offences which had been confessed before the Privy Council, or which the Privy Council had certain reasons to suspect to have been committed; and it gave jurisdiction to try offences in this country or abroad; it, in fact, applied to all the world. Depardo did not owe any allegiance to the king, although he was one of the crew of a merchant vessel, and but a short time on shore with the *animus revertendi*.

ALBENSON, B.—A foreigner owes allegiance while he is on board ship; but it ceases when he goes on shore into a foreign country; an Englishman carries his allegiance along with him to a foreign country.

Mr. Collier.—It was put by *Burrough* for the prisoner, that if he had consented to serve on board a King's ship, the case would have been different, and he probably would have been triable, although the offence had been committed in the manner it was, but his merely contracting to serve on board a merchant vessel was not an engagement with the King, which subjected him to our jurisdiction. The case of *Rex v. Azso-pardi* is in point just so far as it shews that because an Englishman is triable for the murder of a certain person, yet that person would not necessarily have been triable if he had murdered the Englishman, and that, therefore, it does not necessarily follow that if Mr. Palmer would have been triable for the murder of these men, therefore, they are triable for his murder. An English sailor would have been triable for murdering Depardo.

Assuming then a murder to have been committed by the prisoners on board the *Wasp*, yet being taken in contravention of a treaty, or without any treaty, they would not have been triable here; *a fortiori* they are not, if it were committed on board a foreign vessel, which the *Felicidade* was.

Pirates, indeed, according to the common definition of the word, are an exception to all the above rules; being common

robbers of the sea, to be hunted down by the vessels of any nation whatever. Lord Coke describes a pirate as *communis hostis*, whose hand is against every man. But the prisoners are men who navigate the high seas, without any intention of attacking any body, for the purpose of fetching a cargo of what is considered to be personal property by the laws of their country, and which, by the laws of this country, was also so considered very recently. It was said by Lord Stowell, as late as 1827, that we recognised slaves to be personal property in our colonies, and that a transfer of slaves in our colonies at that time made in this country, would be lawful. By the common law of nations, dealing in slaves is no piracy, and to call a dealer in slaves a *pirate* is simply to misuse a term. If they are *pirates* at all, it must be by the treaty, because no other evidence was put in.

To declare a certain act *piracy*, to make criminal what was not criminal before, is without the scope of treaties. The Sovereign of this country has power to make treaties of a certain description, without confirmation on the part of the Legislature; for example, treaties of peace: but the Sovereign has not power to conclude a treaty alienating any of the possessions of the Crown, or a subsidiary treaty, promising to lend money to another country, (for money cannot be raised without the consent of the subject), or altering in any respect the criminal law of this country. If it were necessary to make that clear, here are laws passed which enact, although treaties declaring the slave trade unlawful existed before they were passed, that from and after the passing of these acts, and, therefore, not before, the slave trade shall be unlawful.

A treaty was put in, ratified by the Emperor of Brazil. If it be assumed, which it cannot be, that the Emperor of Brazil is despotic, even then it would be necessary that some law passed by him, in his capacity of legislator, should have been shewn; but the constitution of Brazil is representative. In the absence of evidence, then, of a Brazilian law, recognizing and confirming the treaty, the case of the Crown breaks down.

inasmuch as it is not shown that the prisoners were taken by their *consent* given in any way whatever. But assuming that such a law need not be shown, the first article of the treaty (which there was some attempt on the part of the Crown to separate from the other articles), is merely declaratory, not conferring any powers whatever, or directing that vessels shall be taken at all, or under what terms; and if it stood alone, could confer no power of search or capture. If it is to be literally taken that any person engaged in the slave trade shall be deemed a *pirate, hostis omnium*, it would follow that we have a criminal jurisdiction over him, which is obviously more than either country intended. That clause, then, if taken alone, would prove too much. But it must be taken together with the rest of the treaty, to which it is merely in the nature of an inducement.

[Mr. Collier here read the clauses in the treaty, and in the instructions, which declare that no vessel shall be taken except by a vessel of the navy, having special instructions, and unless she have slaves on board.]

It was ruled by the learned Judge at the trial, that these clauses were merely *directory*, and that non-compliance with them, did not necessarily vitiate the capture. If it is possible for any clause in any treaty to be not merely directory—these are not merely directory. If, notwithstanding an express stipulation in the most solemn of contracts between two countries, that no vessel shall be taken which has not slaves on board, a vessel may be taken without slaves on board, at the discretion of an officer, what limits are there to the discretion of officers? Why might not an officer choose to take a vessel not fitted up even for the slave trade, or not a Brazilian vessel at all? How is it possible for countries to bind themselves by any stipulations not to be broken through by their officers?

The other stipulations, relative to the capturing vessel being a man-of-war, with special instructions, are as explicit and as binding. Is it to be supposed that an officer on the African

coast can have the power to commission any number of vessels he pleases—to multiply the navy indefinitely—to press any merchant-vessels into his service—to send four or five men perhaps into each—subdividing or increasing infinitely that force with which he is intrusted, as adequate in the opinion of the government to its destined purpose? If he could fit out any number of vessels with any amount of arms, and with any number of men, the consequence must be great confusion, and probably deeds of violence and blood. One of the reasons for this treaty being so explicit is, that Brazilian slavers may know under what circumstances English vessels have and have not a right to capture them; and consequently where they have and have not a right to resistance and to recapture, for the right of recapture follows the right of resistance.

Would it be fair to the country with which we have made these solemn stipulations, and which considers them binding, as they must obviously appear to an ordinary apprehension, to hold them as merely directory, dispensable with by our officers?—would it be fair to the prisoners? One of the evil consequences which might be expected to result from such a discretion did result in this case: an inefficient force was put on board the *Felicidade*, insufficient arms were supplied, and there was strong temptation (no justification in itself certainly) to the prisoners to seize the opportunity offered of recovering their liberty. Whether or not that stipulation in the treaty which directs that the search shall in no case be made by an officer under the rank of lieutenant is directory or not (unquestionably that which directs that the search shall be made in the mildest possible manner is directory), the other stipulations cannot be directory, and it follows that the *Felicidade* was unlawfully captured, and that, in fact, compensation is now due to her owners.

Even if the *Felicidade* were lawfully captured, there was no alteration of the property in her till condemnation and sale: (Article 8, of regulations Mixed for Commissions attached to the convention of 1817)—if not lawfully captured, there was no

incipient alteration of the property: in neither case therefore was she an English vessel, but remained, *quoad* jurisdiction, foreign land. *A fortiori*, was she not a vessel of the English navy, and therefore the capture of the Echo by her was unlawful also.

It does not appear that Lieutenant Stupart was sent in pursuit of the Echo. There was, moreover, nothing to induce the crew of the Echo to believe that the Felicidade had a right to capture them. Doubtless being engaged in the slave trade, they were aware of the stipulations of the treaty, relative to the circumstances under which they were liable to capture. And it was impossible for them to arrive at any other conclusion than that they were not bound to surrender to the Felicidade, but would have been justified in resisting, and consequently in recovering their liberty. The Felicidade was larger than the Echo, and all that the crew of the Echo knew was that a larger vessel than their own with Englishmen on board, called upon them to surrender. It was impossible for them to guess at the smallness of the force, otherwise most probably they would have resisted.

The capture, therefore, both of the Felicidade and of the Echo was unlawful, and consequently Majaval, the only one of the crew of the Felicidade then left, except the witnesses, and also all the other prisoners were in unlawful custody. Assuming therefore that we have jurisdiction to try them, their offence does not amount to murder.

If a man is in unlawful custody, to destroy his gaoler in order to free himself, is at the most manslaughter and not murder.

ALDERSON, B.—That must depend on circumstances, I think.

Mr. Collier.—On the subject of the amount of violence,

Lord DENMAN, C. J.—I think we cannot go into any particulars of the evidence you have to argue upon the case.

POLLOCK, C. B.—Especially as those points would be questions for the Jury, and either have been submitted to the Jury and disposed of, or have not been submitted at all.

Mr. Collier.—The amount of violence was not submitted

to the Jury at all ; the Jury were told that the prisoners were in lawful custody, and therefore, if violence was or was not necessary to their liberation, they equally committed murder ; the jury may have thought there was no unnecessary violence. The point was not decided.

ALDERSON, B.—The only difficulty is, whether the case raises it?

ERLE, J.—You may assume that point most favourably to yourself.

Mr. *Collier*.—I therefore assume that no more violence was done than was necessary to obtain their liberation.

ALDERSON, B.—There is no finding there was.

ERLE, J.—There is no question about it.

Mr. *Collier*.—To recapitulate the argument, *first*, no person is triable who does not owe allegiance of one of those kinds mentioned in *Calvin's* case to our Sovereign ; and no person owes either of those kinds of allegiance who has not either been born in this kingdom, or by some act of his own, accepted the protection of our laws, and promised subjection to them, actually or constructively : the case of these men is totally different from that of prisoners of war, because prisoners of war are captured by the laws of war to which they are assumed to have consented, and the sparing their lives is a consideration on which subjection on their part to our laws may be grounded, whereas these men were captured by no law at all, but in contravention of all laws of war and of peace, nor can their consent to being in our custody be implied by any inference whatever. The treaty could not be sufficient evidence of their assent without a law to which they had, by their representatives, subscribed ; but if the treaty *might be* sufficient evidence of their consent, the treaty *is* evidence that they did not consent, prohibiting as it does, and not authorizing their capture.

Therefore, had this deed been done on board the *Wasp*, still the prisoners would not have been triable here, but inasmuch as the capture of the *Felicidade* was unlawful, the offence took place on board a Brazilian vessel, and to a certain extent on

Brazilian land ; for it is laid down by Vattel, that the vessels of a country are part of its territory, so much so that a child born on board a vessel of any country, is considered to be born in that country ; and to apply this test, had a child been born on board the *Felicidade* at the time of this transaction, it would have been born in Brazil and not in England. It has been held that a slave coming on board an English ship receives his liberty on the same principle. We have therefore no more jurisdiction over these prisoners than if the offence had been committed in Brazil.

It cannot be supposed that Lieutenant Stupart, being in mere possession, and in mere wrongful possession of a foreign vessel, thereby established the jurisdiction of the King of England over these men. Lieutenant Stupart was either a private wrong-doer, or he acted wrongfully under the sanction of this country. If he was a private wrong-doer clearly his act could not alter the property of the vessel, or give the King jurisdiction ; if he obeyed instructions that were given him in contravention of the treaty, the only difference is this, that our Government was the wrong-doer, and the capture of the vessel, by the authority of this country, in contravention of the treaty, was an act of hostility against Brazil, which the prisoners were justified by the laws of war, if not of peace, in resisting. In either case their right to resistance was the same. Lastly, assuming our jurisdiction, the prisoners being in unlawful custody, and it not having been found by the Jury, that they used more violence than was necessary for their liberation, their offence is not murder. For these reasons the conviction is illegal.

Mr. Godson for the Crown.—The main arguments urged at the trial on behalf of the Crown have not been noticed. It was urged that the treaties with Portugal of 1815 and 1817, ceased to be any part of the Brazilian treaties in March, 1830—after the three years had expired in which the slave trade was lawful ; it was also contended at the trial, that supposing by any informality the original taking of the *Felicidade* was illegal, that

Cuqueira, the master of that vessel, had submitted, and that having submitted, it was not in the mouth of a third person to say, "I will commit piracy, by taking that vessel from you : I will rob that vessel on the surface of the sea, and in the course of committing that crime of piracy, in the sense in which it is used by the two nations—if I kill Englishmen, that is not murder."

The counsel for the prisoners will have the advantage of replying without my having heard their reasons in answer to that argument, which was so used at the trial. First, the onus lies upon the counsel for the prisoners, to prove *their* case, after the death has been proved on the part of the prosecution. In Foster's *Discourse*, p. 255, on *Homicide*, it is said, "in every charge of murder, the fact of the killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him ; for the law presumeth the fact to have been founded in malice, until the contrary appeareth."

The fact of the death of Englishmen by violence is proved—that is, justified on the ground that the place in which the death of such Englishmen occurred, was a place in which they were illegally confined, after being illegally taken. That is the first argument. What is the fact found by the learned Judge? That these men, within an hour after they had been put on board the *Felicidade*, conspired together to kill all the English on board, and to take her ; so that, if the *Echo* was illegally taken, if the *Felicidade* was illegally taken, but had submitted, about which there is no doubt, for it is expressly found ; (and it is confirmed by the fact, that the master of the *Felicidade* refused to engage in the transaction, in which the others became afterwards implicated), is it competent to the prisoners to say, "we excuse ourselves for killing Englishmen, because we, not being on board our own vessel, but belonging to the crew of the *Echo* ; having been originally

illegally taken and placed where you had no right to place us; after the struggle is over, after all resistance has ceased, have a right to conspire to kill such Englishmen, and to take the vessel of Cuqueira and make it our own property, on the face of the sea:" and that is the justification for killing Englishmen.

Such would not be a justification or excuse for that killing; but it is first contended that the *Felicidade* was legally taken, and also that the *Echo* was legally taken.

The facts with respect to the *Felicidade*, and about which there can be no dispute, are these: Captain Usher, the commander of the *Wasp*, having instructions from the Admiralty, which were used at the trial, and must be considered as evidence, (the book of instructions, of which a copy is kept on board, is a large book, and contains instructions respecting every nation with whom we have treaties). Captain Usher having then authority from her Majesty through her Admiralty, sailing in those seas, for the express purpose of putting down the slave trade, and having those instructions on board his vessel, sends two boats from that ship, for the purpose of capturing the *Felicidade*: these boats followed the *Felicidade*, until she surrendered, and Lieutenant Stupart took possession. He then hoisted the jolly-boat on board, with the ensign of England still flying in it. It is clear that the jolly-boat did not cease to be a part of the equipment of her Majesty's ship, the *Wasp*, as long as the command continued; and therefore, it was, that Lieutenant Stupart did not transfer the ensign of England to the mast of the slaver, but continued it on board the jolly-boat. While it was in that position Cuqueira submitted. She has no slaves on board. The first question is, can she, having then no slaves on board, be legally detained? [*Mr. Godson* here read the Article of the treaty.]

The word "piracy" requires no law book of any particular nation to translate it, but is a word known to all nations—"piracy" is a crime against all nations; and therefore,

when the Emperor of Brazil and the Queen of England, are speaking in a treaty of "piracy," it is a word about which there is no doubt, meaning "a robber of the sea; to be deemed and treated as such."

That is the first clause; at the end of three years there is to be an end of all slavery whatever. There is then to be no longer any necessity for any of those articles of the convention between us and Portugal, which during those three years, of course, were required.

It is recited that the ratification took place in London, on the 13th of March, 1827, so that on the 13th of March, 1830, the slave trade was *piracy*, that is, it was a crime which should be visited by all nations with the consequences of *piracy*, if any Brazilian subject or vessel committing it should be taken.

Attention was drawn to the 5 Geo. 4, for the purpose of shewing it was necessary, in order to make a capture legal, either that the vessel had slaves on board, or that she had *had* slaves during that particular voyage. This, however, is not the true construction; it is not a question of whether there were or had been slaves on board, but if the vessel were *concerned* in the carrying on of the African slave trade, under any pretext, or in any manner whatever.

In the case stated by the Judge, one of the first sentences is this,—“the *Felicidade*, a Brazilian schooner, (there is no doubt about that) was bound on a voyage from the Brazils to Africa for the purpose of bringing back a cargo of slaves.” This shows that the captain was to be deemed engaged in the slave trade.

Now, if he is to be “deemed and treated as a pirate,” who is so to treat him and who not? That leads to the point of the jurisdiction of the Admiralty of England. The jurisdiction of the Admiralty of England extends wherever the waves flow. The expression in many of the old books is that the Queen of England is bound to keep the peace of the sea; her jurisdiction extends at any rate to wherever the tide flows.

PARKE, B.—On the narrow seas the jurisdiction of England is claimed, not over all the ocean.

Mr. *Godson*.—The Admiralty jurisdiction is every where in the seas, generally speaking.

PARKE, B.—You were saying the Queen has the special charge of the seas—the *narrow seas*. I want to correct the generality of your expressions.

Mr. *Godson*.—The authority is much stronger than the words I used from Sir *Lionel Jenkins*. Here we have a vessel, which by the convention between the two countries, has on board persons who are to be “deemed and taken as pirates.” All I contend for is, that we have a right to take her.

POLLOCK, C. B.—Will you address yourself to the argument of my Brother *Manning*, who takes a distinction between the expressions in the statute 7 & 8 Geo. 3, which makes “being concerned in carrying on” unlawful, but makes the “carrying on” itself to be “*piracy*,” and he illustrated that by our own act of Parliament, which makes any preparation or engagement or contract *unlawful* and liable to be punished; but it is the “dealing with slaves” alone that is *piracy* by our law. You seem to conclude that there is no distinction between “being concerned in carrying on,” and the “carrying on” itself.

Mr. *Godson*.—I am endeavouring to shew first, that the argument of Mr. Serjt. *Manning* cannot apply, because the treaties between us and Portugal were at an end, as a part of the Brazilian treaty, after March 1830.

At the end of three years slavery is to be at an end; but in the mean time it is necessary to have Courts for the adjudication of the prizes of the ships taken; and therefore, the reason for introducing them exists, but when the slave trade ceases, then the reason would cease. This appears from the plain words, and moreover that is the construction put on it by the documents laid before our own Parliament.

LORD DENMAN, C. J.—We have nothing to do with that.

Mr. *Godson*.—Search has been made for the condemnations in the Mixed Court.

LORD DENMAN, C. J.—I do not see how we can hear them at all. You must not go off the four corners of the case, they are not proved in evidence, and it is not evidence that could be received.

Mr. *Godson*.—I will confine myself to the recital of the 7 & 8 Vict. c. 122, in which the Legislature put the same construction. I am now upon the question of what is the construction to be put upon the first convention and treaty between us and the Brazils—the treaty of 1826, and here it is recited: “And whereas by the said convention it was agreed between the high contracting parties, to adopt for the purpose and period therein referred to, the several articles and provisions of the treaties concluded,” evidently showing their being adopted for the purpose of that convention, that is, for the three years, while the slave trade might be carried on; that they ceased at the moment that the slave trade ceased in itself by efflux of time, in any manner, or under any pretext. Then the learned Judge says, “that the vessel sailed from the Brazils to the coast of Africa *for a cargo of slaves*.” It is clear that finding is quite sufficient to meet the argument insisted on by Mr. Serjeant *Manning*, that they were “*carrying on*,” because, although to be *concerned* may be only unlawful, yet the “*carrying on*” is piracy.

WILLIAMS, J.—May you not also contend there was no evidence to show that the purpose was abandoned?

Mr. *Godson*.—That point arises next. What Mr. Justice *Williams* says makes it much stronger, namely, that up to the very moment, Cuqueira was in the prosecution of the very voyage, and was taken in the act of prosecuting it and there is no evidence that he abandoned his intention. The words are “at the time of the capture, the Felicidade was fitted for the reception of a cargo of slaves, and was within

sixteen miles of the shore;" and it was afterwards stated to be within ten miles of the shore. Therefore, first, after the three years, the Portuguese treaties were at an end, and formed no part of the Brazilian treaty; but even if there be any informality in the taking of the *Felicidade*, she was undoubtedly, by the submission of her master, in the possession of the Queen's officer; it does not lie in the mouth of *Serva* and the crew of the *Echo*, to say, "because you illegally took the *Felicidade* from the owner of the *Felicidade*, I have a right to retake it, and I have a right to kill, for the purpose of retaking it."

Now, that *Cuqueira* did submit is clear upon the finding; my Lord reports to your Lordships, that he surrendered, and that afterwards, when solicited by *Serva* to join in the plot he refused to do so, and endeavoured to dissuade the rest from carrying it into execution. And, therefore, the *Felicidade* is either legally taken with all due formality, or if that be not so, her commander has submitted, and she was in the possession of the officer whose jolly-boat at that time was with her.

COLTMAN, J.—I do not see the jolly-boat is found.

Mr. *Godson*.—These are the words: "Lieutenant *Stupart* accordingly steered that course, but did not observe any object until the following morning at day break, when he descried the *Echo*, a Brazilian brigantine, commanded by the prisoner *Serva*. He chased her, and coming up with her at ten on the following night, fired a pistol as a signal to bring to—got into the jolly-boat, and hoisted the British colours."

Therefore Lieutenant *Stupart* never parted with his jolly-boat and his British ensign. It is true he had with him the *Felicidade*—that he was bound to have by the order of his commander Captain *Usher*.

In that situation, therefore, being on board the *Felicidade*, Captain *Usher* makes a sign to him to steer in a particular direction; he obeys that signal, and the next morning descries a ship, which he sees to be a slaver; he then leaves the *Felicidade*, he himself, the lieutenant, with his ensign

flying, and his proper uniform as an officer. We then hear that the captain of the *Echo* hailed the men in the boat, and asked "who they were," and on being informed that "they were Englishmen," immediately sailed. So that the beginning of the attack, or the beginning of the taking is by Lieutenant Stupart, personally in his uniform as a lieutenant, in the boat of the *Wasp*, and that boat is as much a part of the *Wasp* as any rigging or any other equipment that belongs to her.

The *Echo* having got away at ten o'clock that night, they keep up the chase till the next day. When they come up to her the next evening, the lieutenant standing on the deck of his own boat holds conversation with the midshipman on board of her. Have the terms then of the treaty been fulfilled? It is said, first, she is not taken by a British cruiser. She is, however, taken by the officer who belonged to a British cruiser by his boat. It is said she is not taken by a lieutenant, but by a midshipman. But it is the lieutenant who approached, it is the lieutenant who had the conversation, and, at that time, was in full uniform; it is the lieutenant on deck who speaks to the midshipman on board the *Echo*. Then it is said, "There was no book of instructions on board the *Felicidade*." That is perfectly correct, but the *Echo* is not taken by the *Felicidade*, she is taken by those means which the British government had provided for the purpose of taking her; namely, by the *boat*, which had belonged to the *Wasp*, and on board the *Wasp* the book of instructions, and the proper book of instructions, was undoubtedly existing. And, therefore, the three objections with respect to the *Echo* all vanish, assuming every thing under the Portuguese treaty was necessary to be performed, because undoubtedly slaves were on board; there were 400 and odd slaves on board; and it is found moreover, that Lieutenant Stupart had boarded the *Echo* several times before, and to *Serva* was well known as an officer of her Majesty's navy.

Then, if this dispose of all the objections that have been

made with respect to the *Felicidade*, when made with respect to the *Echo*, they all vanish. She had slaves on board, she was taken by a lieutenant, that lieutenant had his uniform on, and a book of instructions was on board the vessel from which the boat came by which she was taken.

- In the case of the *Melomane*, a captain hired a boat, and having put his men on board, that boat did not become part of her Majesty's navy; the only question in that case was, which way the money was to be distributed, and not whether the capture was right. It shews that a boat even hired, when you put British subjects on board, may lawfully make a capture; but it became a question in the Admiralty Court to whom the prize money was to be given, whether it was to be *droits* of the Admiralty, or prize to the party, but each party concurred that the capture was legal.

It follows that with respect to the *Echo* every thing was done that the strictest letter of the law required to be done; and that with respect to the *Felicidade*, we had a full right under the treaty to take her—it is not necessary to go beyond this. It has been properly said, that when two nations enter into a treaty, creating a crime, before it can be carried into execution in England, there must be an Act for the express purpose of giving jurisdiction to some particular Court to try—it has been well said by Vattel, that there is no international Court, unless two nations will make that Court—the Mixed Commission was made by the two nations. Then this is quite clear, that the *Echo* being legally taken under all the due formalities, and the crew having been taken in custody on board the *Felicidade*, we had a right to bring them somewhere. It need not be argued that we could have tried them for piracy in this country when they had been brought here. It has been said—"Supposing these men had been brought to this country, until we had some act of Parliament and some Court, we could not have tried them," but being pirates by the mandate of their own nation—being persons liable to be punished

by their own laws, and we having jurisdiction upon the seas given to us by the Sovereign of that country, all that we have done is taking them for the purpose of handing them over to that country, and that is all that need be contended. They are legally in custody under that first clause of that convention, whatever might become of them afterwards. We all know what really does become of them, namely, that if these vessels, the Echo, or the Felicidade, had been taken to Sierra Leone, the Mixed Commission would have condemned the vessel or not—would have either given it up again or awarded it to the captors; but the men would have all gone free, there being no law yet provided by England for the purpose of trying the *crime of piracy*. But this is quite clear, that having got them, it is not for them to say that the place in which they were put was illegal; if a man be taken up for an offence for which we have a right to take him, it does not lie in his mouth to say—"you are not legally in possession of the place you confine me in, and therefore I will get out;" neither does it lie in the mouths of Serva and the men who have conspired to kill, to say, "you did not lawfully take the Felicidade." It is not the crew of the Felicidade who are urging this, except Majaval—all the others are the crew of the Echo, with the exception of him.

Here was a vessel in possession of officers of her Majesty, by the submission of the owner of it; other persons having no connection with that vessel conspire together to commit piracy upon that vessel. In the course of the execution of that conspiracy they kill an Englishman—they say they are justified. Now it is certain that piracy may be punished by us, whether it be committed upon one of our own vessels or on a vessel belonging to an ally. This doctrine is also laid down by Sir *Lionel Jenkins*, in his famous charge, which is generally quoted as an authority. He says, distinctly, "Nor does the case differ, although the party so assaulted and despoiled should be a foreigner not born within the King's alle-

giance ; if he be in *amicitia regis*, he is *eo nomine* under the King's protection, and to rob such a one upon the sea is piracy."

The argument entirely fails with respect to what are the particular municipal laws of any country, because piracy is a crime which all nations acknowledge to be one that all nations may punish, and therefore the Queen having jurisdiction, by means of her Admiralty on the waves, where this jolly-boat and the Felicidade, her prize, were floating—these persons from the Echo conspired to take that vessel either from her Majesty, who had the possession, by her officer, or else from Cuquiera, who belonged to it ; and in the course of committing that crime they kill—are they justified ?

Lord *Tenterden*, in his argument in *Depardo's* case, 1 Taunt. p. 26, states the cases that have been tried with respect to foreigners ; Depardo was not tried under the act of 28 Hen. 8, respecting the Admiralty, but the 33 Hen. 8, which has been referred to, therefore the jurisdiction of the Admiralty did not arise in that case ; it is assumed all the way through that case, that if it had been a case tried under the Admiralty jurisdiction, then he must have been convicted and executed.

Lord *Tenterden*, in the course of the learned argument, says, "There are three recent cases of trials of foreigners for similar offences, under the 28 Hen. 8, that is, the Admiralty act ; the other is the 33 Hen. 8. The first, in order, is that of Francois Antoine Sauvajot, a French prisoner of war, who was indicted for the murder of Mosteau, another French prisoner of war, on board the Triton, East Indiaman, upon the high seas, at the entrance of the English channel, in September 1799. He was convicted of manslaughter, and burnt on the hand ; this was a short time after the act of 39 Geo. 3, c. 37, sec. 1, received the Royal assent. The second case is that of Jean Prevôt, a Frenchman, who had entered at Falmouth as a marine, on board the Lady Shore transport. He was indicted at the Old Bailey, in December 1799, for, 'that on the high seas, within the jurisdiction of the Admiralty of England, with

force and arms, he assaulted and murdered Wilcox, the master of the *Lady Shore* transport.' The offence was committed off Cape Trion, in Africa, on the passage to New South Wales. He was convicted and executed: it is not known whether he was a prisoner of war, or not. The third case is that of Acow, a Chinese mariner, who was tried for a murder committed in May 1806, on another Chinese mariner, on board the *Travers*, East Indiaman, on the high seas, about twenty leagues from the Azores, in the course of the homeward voyage, from which circumstance it appears that the prisoner must have entered on board that ship abroad."

ALDERSON, B.—Those are all on board English ships.

Mr. *Godson*.—I am now on the question of his being a *foreigner*. I say this ship is in possession of her Majesty, either originally by regular taking or afterwards by consent, consequently we have a right to try persons for an offence committed on board that vessel.

The case of *Rex v. Sawyer*, (Russ and Ry. p. 294), shows this, that while counsel were reasoning with respect to land and showing that a person cannot be tried who commits an offence on land, it seems almost to have been taken for granted, that if it had been a British ship floating upon the ocean, and the foreigner had committed the crime there, there could be no doubt whatever respecting the jurisdiction. Supposing that the prisoners were illegally taken, and were in a place of illegal confinement, does that justify the killing? It is said that the question of the amount of force necessary, does not and never can arise. A party being on board that which is in the possession of the Queen, kills an Englishman for the purpose, as it is contended, of regaining his liberty. It would amount to this: that if a party be taken up in any county of England, and if he ought to be confined in the gaol of that county legally, but he is put into a gaol in another county, in which he ought not to have been confined, that he can kill, for the purpose of coming out. This is not the case quoted by Mr.

Collier, where the peace-officer was shot in the act of resistance—that is founded upon the undoubted rule that applies to all laws and all nations, namely, self-defence ; but the contention at present is, that being in custody, as they say, in an illegal place, and having been brought illegally into that custody, after the taking is over—in cold blood—long after all time for cooling has taken place, the prisoners can conspire to kill the people who have them in custody. Why is it to be justified? Is the party about to be murdered himself? Certainly not! He is about to be taken to a place, the moment he arrives at which he will be released—his life was never in danger for a moment ; and therefore, on the narrowest ground, here is the fact of a conspiracy to kill ; and it is not a justification of that conspiracy so to kill for a party to say, “I was originally illegally taken for something else, and this place in which you confine me is a place in which you have no right whatever.” These propositions being then established—first, that the *Felicidade* was either legally taken or that she surrendered, and was in the possession of the officers of the Queen ; and secondly, that the *Echo* was undoubtedly legally taken, with all the formalities that were necessary by all the treaties ; (and if the *Echo* was properly taken, and those persons were properly in custody, it becomes immaterial whether the *Felicidade* was or was not), because it does not lie with them to say she was not, it follows, that for these parties (being on board the *Felicidade*, then in possession of the Queen) to conspire for the purpose of gaining their liberty, and to conspire to *kill* for that purpose, much more for them to conspire to kill for the purpose of obtaining the vessel which belonged to another man—that that is undoubtedly murder. And, to take the case in any way whatever in which it can be placed, sufficient reasons have been given why this conviction for murder should be supported. The verdict is taken on the third count of the indictment.

Manning, Serjt., in reply,

Her Majesty cannot by a mere wrongful act of any of her subjects, acquire a property in a ship, or in anything whatever. It is an established and well known maxim of the law of England, that the King can do no wrong,—that he can acquire nothing by wrong, the King cannot be a *disseisor*, nor can any person be a *disseisor* to the King's use. If any person does a wrongful act *eo nomine* for the benefit of the King, it shall not enure for the benefit of the King, but it is the mere wrongful act of that party. Therefore, if the vessels were wrongfully taken, such wrongful taking is the act of the individuals who took them, although they were holding offices of rank in her Majesty's service.

It is said, that this treaty expired in 1830; in the face of the language of the 8 & 9 Vict. c. 122; which recites, that the fifteen years after 1830, during which the treaty was to subsist, expired on the 13th of March, 1845, and that the Crown of Brazil had given notice to her Majesty's government, that the treaty would not be renewed, but had consented that the Mixed Commission sitting at Sierra Leone, should have the authority to adjudicate upon vessels which had been taken before the expiration of the treaty, namely, before the 13th of March, 1845. The transaction which now forms the subject of inquiry occurred on the last day of February, 1845.

The capture therefore of both vessels in contravention of the treaty then in force was illegal—and the Felicidade remained a foreign vessel.

Non constat, that this jolly-boat, was the jolly-boat of the Wasp. But if it was, the capture was not effected by it, but substantially and *bonâ fide* by the Felicidade.

Who was the capturer? Lieutenant Stupart did not make the 'visita' or search of the Echo, but the person whom he sent on board. It might as well be said that the search was made by Captain Usher, or by the Commissioners for exercising the office of Lord High Admiral of Great Britain, because they authorized it. The meaning of the treaty is plain, suited to the capacity of plain sea-faring men, namely,

that the person who came to see what they had on board and to search the vessel, was to be a person qualified with the rank, and having the responsibility of a lieutenant in the British navy.

It is not pretended that the *Felicidade* had instructions ; but if the capture had been constructively by the *Wasp*, even she had not instructions, in conformity with the treaty : either none were in evidence, or those in evidence were improper.

It is said the *Felicidade* was rightfully in the possession of Lieutenant Stupart, because Cuqueira (the captain) acquiesced in the capture, there being a sort of assignment from Cuqueira to Lieutenant Stupart—that assignment consisting in not resisting, at the peril of his life. If he had refused to surrender he would have been attacked by Lieutenant Stupart and his crew. Undoubtedly, a killing, if unexplained, is *prima facie* murder: but the circumstances here are explained. But that argument does not affect the jurisdiction. The prisoners are not pirates *jure gentium*, or capturable as such. Until the slaves were actually on board, they were not pirates by treaty, there was a *locus penitentiæ*. In the case of the *Melomane*, no question arose as to the lawfulness of the capture, which was in war. The case of the *Louis*, 2 Dod. Adm. Rep. is in point.

Mr. *Collier*, in reply. No answer has been attempted to the proposition, that no person is triable by the laws of a country, who has not consented expressly or impliedly to submit to them. No case can be adduced in which we have ever exercised jurisdiction over a person who has not so consented.

None of the cases referred to in the argument by Lord *Tenterden*, in the case of *Depardo* establish this ; they simply relate to persons in English vessels, and it does not appear that any one of those persons had been taken on board of them illegally : those cases, moreover, were not argued by counsel. Suppose a Frenchman kidnapped on the coast of France by Englishmen, and dragged into this country, such wrongful act of the Englishmen would not subject the Frenchman to our laws. The case would not be altered against him, though it

might possibly be in his favour, if he were dragged on board an English ship: this was the case of the prisoners who were taken by no law of war or peace, but in violation of a treaty. Their forced submission, with the alternative of being fired upon, makes no difference. The fact of a person being on English land or ship board, establishes a *prima facie* case only of subjection to the laws, to be rebutted by circumstances negating the supposition of allegiance.

On the subject of jurisdiction on the high seas, Vattel says, "No nation whatever has a right to take possession of the open sea, or claim the sole use of it to the exclusion of other nations, the right of navigating and fishing in the open sea being the right common to all men, * * * * the nation that seeks to exclude another does him injury, and furnishes sufficient ground for commencing hostilities; nay, more, a nation which, without a legal claim, would arrogate to itself an exclusive right to the sea, and supports its pretension by force does an injury to all nations." (*Lib. i. c. 23, s. 281.*)

It has been attempted to rest the lawfulness of the capture of the Echo, on the circumstance of the jolly-boat being on board the Felicidade; but assuming the identity of the boat, a capture by it would not be a capture by the Wasp. The boat was not sent in pursuit of the Echo: she was on board another vessel, and possibly many hundred miles from the Wasp, and was for the time being the boat of the Felicidade. Supposing the capture could be held lawful, on the ground that the boat on board the Felicidade belonged to the Wasp, it would be in the power of any English officer to evade the provisions of the treaty. Cruisers might remain in harbour, and commission any number of vessels to capture slavers, by putting their boats on board them. Foreigners could not but regard such a proceeding as a breach of faith. It would be impossible for them to guess they were legally captured, because a boat belonging to a cruiser, some time or another, happened to be on board the vessel capturing them.

A separate article appended to the treaty of 1817, runs thus:

"As soon as the total abolition of the slave trade for the subjects of the Crown of Portugal shall have taken place, the two high contracting parties hereby agree, by common consent, to adapt to that state of circumstances, the stipulations of the additional convention, concluded at London, the 28th day of July last; but in default of such alterations, the additional convention of that date shall remain in force until the expiration of fifteen years from the day on which the general abolition of the slave trade shall so take place, on the part of the Portuguese government."

It was argued, that inasmuch as the slave trade was totally abolished in 1830, on the part of Brazil, from that time, the articles regulating the conditions of capture, were not required. It appears, if not altered, they shall remain in force fifteen years.

Mr. Godson.—As to Portugal, I did not say Brazil.

Mr. Collier.—The treaty is adopted *mutatis mutandis*. If necessary, after the total abolition of the slave trade, on the part of Portugal, they were equally necessary after its total abolition, on the part of Brazil. The 8 & 9 Vict. c. 122, moreover recites, that the whole treaty is in force. The first article, taken by itself, is merely declaratory, and gives no right of search or detention. The prisoners being in unlawful custody, and there being no finding by the Jury that they used unnecessary violence in extricating themselves, it is necessary, in order to support the conviction, to prove that a person in unlawful custody, killing his gaoler, under any circumstances whatever, must be guilty of murder. But it is not so. *Rex v. Thompson*, 2 Mood. C. C. 80. *Rex v. Curvan*, 1 Mood. C. C. 132.

The Judges having expressed a desire to hear a further argument by Civilians, the prisoners were further respited.

The case was again argued before their Lordships on the 3rd of December. When Mr. GODSON, Q. C., Sir JOHN DODSON, Queen's Advocate, and Dr. PHILLIMORE, appeared

for the Crown. And MANNING, Serjt., Dr. ADDAMS, Dr. HARDING, and Mr. COLLIER, appeared for the prisoners.

Dr. *Addams* said, I will confine myself as much as possible to so much of the case as falls within my branch of the Profession. The sole question is this, whether or not the prisoners were lawfully captured? Because if they were not, first there was no *corpus delicti*; and secondly, our Courts have no jurisdiction. The learned Baron, in his summing up, assumed that the prisoners were in lawful custody, and directed the Jury that if they were of opinion, that they being in such lawful custody, plotted to slay the English and run away with the vessel, they were bound to find them guilty of murder. Now, if they were in unlawful custody, the plot to kill the English and run away with the vessel, will assume a different aspect, being changed into a plan to regain their liberty of which they had been unjustly deprived. And if in the execution of such a plan a killing ensued, it would not be murder. 1stly, With regard to the *Felicidade*, she, being a Brazilian vessel, could only have been detained under the convention between this country and Brazil, and the Act of 7 & 8 Geo. 4, c. 74, founded on it. The act in substance said—"That during the continuance of the slave trade, it should be carried on in such and such a manner; and if carried on otherwise, should be attended with such and such visitations, and from and after a certain period should not be carried on at all; but if carried on under any form or pretext, should be deemed and treated as piracy."

If the prisoners were pirates, "*jure gentium*," as distinguished from any municipal law, the conviction is right, but under the Act of 7 & 8 Geo. 4, c. 74, and the convention taken together, they are not pirates at all, and "*a fortiori*," not pirates, "*jure gentium*."

In the case of the *Louis*, (2 Dodson, 210) the question of piracy was fully considered. The *Louis*, a French vessel, notoriously a slaver, was captured by the King's ship *Queen Charlotte*, and resistance being made, eight of the crew of the

latter were killed. It was considered there was no piracy. In Wheaton's *Elements of International Law*, p. 164, the definition of piracy is thus given :—

“ The judicial power of every state extends to the punishment of certain offences against the law of nations, among which is piracy. Piracy is defined by the law writers to be the offence of depredating on the seas without being authorized by any sovereign state, or with commission from different sovereigns at war with each other. The officers and crew of an armed vessel commissioned against one nation, and depredating upon another, are not liable to be treated as thus exceeding their authority. The state by whom the commission is granted, being responsible to other nations for what is done by its commissioned cruisers, has the exclusive jurisdiction to try and punish all offences committed under colour of its authority. * * * * *

This proposition, however, must be confined to piracy as defined by the law of nations, and cannot be extended to offences which are made piracy by municipal legislation. Piracy, under the law of nations, may be tried and punished in the Courts of Justice of any nation, by whomsoever and wheresoever committed; but piracy created by municipal statute can only be tried by that state within whose territorial jurisdiction, and on board of whose vessels, the offence thus created was committed. Thus the crimes of murder and robbery committed by foreigners on board of a foreign vessel on the high seas are not justiciable in the tribunals of any other country than that to which the vessel belongs; but if committed on board of a vessel not at the time belonging, in fact as well as right, to any foreign power, or its subjects, but in possession of a crew acting in defiance of law, and acknowledging obedience to no flag whatsoever, these crimes may be punished as piracy under the law of nations, in the courts of any nation having custody of the offenders.”

The prisoners then were not pirates “*jure gentium*,” but because a convention is entered into, declaring, that the trading

in slaves shall be deemed piracy, is it therefore piracy, without any prohibitory statute, ordinance, authority or edict? Although the period, from which the parties referred to in the convention, were to be treated as pirates, expired in 1830, the stipulations of the convention have been waived by the mutual consent of the contracting parties. No Brazilian has since that time been visited as a pirate. [The learned Doctor here referred to the terms of the treaty of 1826, which adopted the terms of the convention with Portugal of 1817, and to the conditions of search and capture therein contained, which have appeared at length in the former argument.]

Either there were or were not instructions on board the *Wasp*. If there were not she was not an authorized cruiser—if there were, they were the instructions specified in the act, or they were not. If they were the instructions specified in the act, she exceeded her power, (the *Felicidade* having no slaves on board), if they were not, she was not qualified to make the capture. If the British officers acted conformably to wrong instructions of their own government, that would be a justification to them, but would not alter the case with respect to foreigners.

PARKE, B.—Supposing, instead of a murder there had been a larceny committed on board the *Felicidade*, would the Admiralty have had jurisdiction? Would it if the vessel had been seized under Admiralty instructions, which were contrary to the treaty? Would it if the vessel had been seized by a British subject contrary to instructions or without instructions?

Dr. *Addams*.—In neither of these cases would the Admiralty have had jurisdiction.

ALDERSON, B.—Is the nationality of the ship changed by a capture, which is the private wrongful act of the captor? And is it changed by a capture which is the wrongful act of the government?

Lord DENMAN, C. J.—Where should an offence, committed on the deck of the *Felicidade*, after the capture have been tried?

Dr. Addams.—A wrongful seizure, even if made in compliance with instructions from our government, could not bind foreigners so as to make them liable to be tried in this country and by our laws. The officer might be justified to his own government, but there would be no privity between our government and the foreigner. In the absence, however, of evidence of the sanction of our government, such sanction would not be presumed against the prisoners.

The capture of the *Echo* was illegal, *first*, because the visitation and search were made by an officer of inferior rank to lieutenant. And, *secondly*, because the visitation and search were not made by a ship of war belonging to the royal navy, provided with special instructions. The *Felicidade* might at the time of the capture of the *Echo* have been 500 miles from the *Wasp*, for the vessels might have sailed in opposite directions. The *Felicidade* could not be considered a tender or boat of the *Wasp*. In the case of the *Zepherina*, (2 Hagg. Adm. Rep. 317,) it was held that the tender must have been attached to the King's ship by order of the Lord High Admiral—and in the case of the *Donna Barbara*, (2 Hagg. Adm. Rep. 366,) it was held, that, inasmuch as the seizure of a Portuguese slave ship must by the convention be made under the personal directions of a commander of a ship of war, therefore, a seizure by an open boat (the crew of which was borne on the books of a King's ship) commanded by an officer of the rank required to make the search, but actually putting off from an unauthorized tender, and at a distance of 1500 miles from the King's ship, did not entitle the ship to bounties, on the slaver being condemned as a prize to a tender to a King's ship. There was no incipient conversion of the property in the *Felicidade* by means of an unlawful capture, and it cannot be contended that the captain of the *Wasp* could make any vessels, which he had captured *quo jure*, *quod injuriâ*, or bought, or hired, or in any way taken into his service, tenders to his vessel so that they could capture slave ships under the treaty. The visitation, and search of the *Echo* were unlawful, and if so, the detention was unlawful, for a lawful detention cannot

be grounded on unlawful visitation and search. The act of the prisoners was, therefore, not a *plot* to murder, but a *plan* to regain their liberty. There is no finding of unnecessary violence in carrying out that plan, and '*ex natura rei*,' the probability from the whole of the '*res gestæ*' is, that there was none. If the regaining their liberty was a mere pretence to excuse the killing, it might be murder, but the intention to regain their liberty was *bond fide*, and no other object appeared.

The right to resist an illegal arrest has been carried to a great extent in this country—even where a third person officiously interfered and killed the officer who was about to make the illegal arrest—it was held not to be murder. *Tooley's case*, (2 Lord Raym. 1301.) *Adey's case* (1 Leach, 206; Russ. on Crimes, 295—601. 633.) Here no question arises of unnecessary violence.

ALDERSON, B.—No such question was left to the Jury.

Dr. *Addams*.—There was therefore no *corpus delicti*. In the next place, the Court which tried these prisoners had no jurisdiction. The proceedings have been '*coram non judice*.' No nation has jurisdiction over the high seas, except over the persons of its own subjects in its public and private vessels. (Kent's *Com. on American Law*, 1 vol. p. 26, 4th ed.)

The only qualification of this doctrine given by Kent and other Jurists, relates to pirates—pirates not belonging, in fact or in right, to any nation whatever, may by the laws of nations be punished in the Court of any nation, and the principle is, that a pirate having no country to try him, would otherwise be justiciable no where. It has been before shown that the prisoners are not pirates in this sense. The vessel was a Brazilian one, for the property in her could not be changed until after condemnation and sale, even if the capture were lawful, but being unlawful there was no incipient conversion; therefore, the allegations in the indictment, that Mr. Palmer was within her Majesty's peace, and that the offence was committed against the peace of the Queen, are not supported.

PARKE, B.—The question is, whether the Felicidade became by the seizure, an English ship, *quoad hoc*?

Dr. Addams.—Not if the seizure were unlawful.

LORD DENMAN, C. J.—Supposing Mr. Palmer had seized a person actually dealing in the slave trade, without orders from his government, for the purpose of taking him to be tried by the law of Brazil, or by the Mixed Commission, and the person so seized had resisted and been killed by Palmer, and Palmer had been tried for the murder, must he not, upon your argument, have been found guilty?

Dr. Addams.—Perhaps so; but it is not necessary to decide that question.

ALDERSON, B.—You will find a great deal on the subject in *Viner's Abridgement*, p. 62.

Dr. Harding, for Majaval, Serva, and Alvez.

First, Neither the Queen's ships nor the Queen's officers, have any general right to search foreign vessels on the ocean, in time of peace; for the sea is free and common to all nations. *Secondly*, The prisoners were not pirates, *jure gentium*, the slave trade not being piracy *jure gentium*, nor unlawful, unless by treaty. *Thirdly*, The prisoners were not pirates under the treaty. *Fourthly*, They were illegally captured and detained, in violation of the treaty. *Fifthly*, They were not *intra pacem*, or subject to British jurisdiction. *Sixthly*, They have committed no crime, or a less one than murder.

[The first proposition being conceded, the learned Doctor proceeded to the second.]

Mr. Justice Story, in giving judgment in the Supreme Court of the United States, in the case of the *United States v. Smith*, (5 Wheaton's Rep. 162,) where a list of the authorities is given, lays down, "that piracy, by the law of nations, is robbery on the high seas." And that position is supported by the authorities there cited. The earliest authority is in the Digest, (lib. 49, tit. 15, par. 19;) piracy is also defined in Bl. Com. (vol. 4, pp. 71, 72,) to be robbery and depredation on the

high seas; and in the 3rd Inst. p. 112, it is said, that the offence was not altered by the statute 28 Hen. 8, c. 15. In the case of *The Louis*, (2 Dodson, 236,) Lord *Stowell* stated his opinion that the slave trade was not piracy, wanting some of the distinguishing features of that offence: it was not an act of general robbery, it was not an act of insulting the coasts of a country; in *Madrazo v. Willes*, (3 B. & Ald. p. 353,) it was held that the slave trade was not piracy. That case was decided in 1820. In 1825, the case of *The Antelope*, (10 Wheat. 120,) was decided in the Supreme Courts of the United States, when the Chief Justice, in pronouncing judgment, said "that the slave trade, though originally contrary to the law of nature, having been carried on by the general consent of nations for so long a period of time, could not be deemed unlawful by the law of nations." In England, it was not prohibited till the 47 Geo. 3, or made piracy till the 5 Geo. 4. Then had these prisoners been made pirates by the treaties between this country and Portugal, and Brazil? In *Marryatt v. Wilson*, (1 Bos. & Pul. 439,) which was a case arising on a treaty between this country and the United States, *Eyre, C. J.*, said, "we are to construe this treaty as we would construe any other instrument, public or private; we are to collect from the nature of the subject, from the words and from the context, the true intent and meaning of the contracting parties, whether they are A. or B., or two independent states. Vattel, (lib. 2, c. 17, s. 268,) lays down, "that treaties are no exceptions to the ordinary construction of documents." He also lays down, (s. 303,) "that penal clauses in treaties are odious;" and in (s. 308,) "that odious clauses in a treaty ought to be construed strictly." Looking at the treaties, then, with a view to ascertain what each party has really meant to undertake and promise, the first thing remarkable which presents itself, is the absence of any means pointed out, or desire expressed by the parties, to have persons engaged in the slave trade brought to justice, or restrained in any way from committing the

offence again. There is not a word of authority for putting them into custody or detaining them in it, or for handing them over to be dealt with by their respective governments. Then, is there any law of Brazil making the slave trade piracy or any offence at all, or for enforcing the treaty in any way whatever? There is nothing in the report of the learned Baron to show, that at present the slave trade is unlawful in Brazil. The case then stands thus—there is no provision in the treaties for bringing persons engaged in the slave trade to justice, or for restraining them from following it; and there is no law in Brazil, inflicting any penalty upon them. Then, is the Crown prepared to prove that a clause in a treaty can bind the subjects of another state, without evidence that it had been conveyed to their attention in a way precluding the possibility of honest ignorance? This was laid down by Lord *Stowell*, in the case of the *Louis*, (2 Dodson, 336.) It has been held that a party committing an offence abroad, before the passing of the 9 Geo. 4, c. 31, could have come to his ears, was excused by unavoidable ignorance. Many treaties are secret, others temporarily concealed; and great injustice would result, if subjects were held bound by treaties, without some proof of their having been cognizant of them.

The prisoners were not carrying on the slave trade within the contemplation of the first clause in the treaty. In the case of *The Ringende Jacob*, (1 Rob. p. 89,) a question arose on an ancient treaty between England and Sweden, which forbade the subjects of either power to sell or lend ships to the enemies of the other power. And Lord *Stowell* held, “that ships lent to carry contraband articles, were not *lent* within the meaning of the treaty.” Lord *Stowell* also dwelt upon the fact of there being no penalty annexed to the offence. These prisoners, except *Serva*, were mere mariners; and the English law distinguishes between those engaged merely in navigating the ship, and those who have an interest in her. 5 Geo. 4, c. 113, s. 11, makes the being engaged as mariners in working a slave

vessel only a misdemeanor, subject at most to two years imprisonment. It could not have been intended by the treaty to make mere mariners pirates.

PARKER, B.—The simple question is, was the *Felicidade* seizable in virtue of the treaty?

Dr. *Harding*.—It seems material to settle the character of those on board, as on that must depend the character of the vessel. There is nothing to shew that they were liable to any penalty, either by English or Brazilian law. Neither of the ships were pirates, *jure gentium*. The *Felicidade* had no slaves on board, there was no presumption that she ever had. By the treaty with Portugal of 1817, the instructions are most positive, that no vessel not having slaves on board, shall be captured or detained on any account or pretence whatever. These instructions are still in force. In the case of the *Susanna*, (6 Rob. 48,) a neutral vessel, had been seized as a prize, or rather for the purpose of examination and search: held, it was the captors had no right to employ it to chase, and capture other vessels. There is no evidence that Captain Usher gave other orders than to *pursue*. There were no orders to capture. Where was the pursuit to stop? They did not come up with the *Echo* till night: *non constat* it was the same vessel. A boat was sent to board her. There is no identification of this boat with the jolly-boat of the *Wasp*, as is sought to be inferred. By the authorities of the cases of the *Melomane* and the *Donna Barbara*, (2 Hagg. 366,) she must be considered the jolly-boat of the *Felicidade*. A party, therefore, boarding by means of this boat, could not place the vessel boarded in legal custody. It was not such a capture as in lawful war would have confiscated the *Echo* to the *Wasp*. The capture was then made by the *Felicidade*, (which had been separated fifty-two hours from the *Wasp*) and was in direct violation of the treaty which confined the right of visitation to ships of the British navy. What then are the consequences attending on this capture? On an illegal capture no

legal consequences can attend. The case of the *Mary*, Lord *Stowell* (5 Rob. 205,) distinctly shows, that an act in itself illegal, can convey no right, and this is a principle in the law of nations. Many cases show that the capture, and detention for any number of years, of neutral vessels, cannot pass the property; that the sentence of a competent Court of legal jurisdiction must have passed, in order to constitute a change of property. And in *Rose v. Himely*, (4 Crach. 280,) the sentence and condemnation being held null and invalid, it was held by the Supreme Court of the United States, that the property was unchanged. In this case therefore, as there was no sentence, the property in the *Felicidade* was not changed. Then the question is, can the capture of the *Echo* by the *Felicidade*, under these circumstances, change the property, so as to bring the persons on board her under the jurisdiction of British law? In "Story's *Conflict of Laws*," it is laid down, that the laws of a country have no force except within its own territory. In this case, Brazil had never parted with her jurisdiction over the *Felicidade*; England, therefore, had acquired none, and the persons on board her cannot be considered British subjects, amenable to British laws. *Calvin's* case, (Coke's Rep. part 7, p. 1,) is in point. The different kinds of allegiance are there laid down. The third kind is '*ligeantia localis*,' (which is said to be "*infima et minima et maxime incerta*,") due from a foreigner who cometh into this country, and who thereby becomes a subject in the lowest sense of the word. Now, in *Rex v. Sawyer*, (Russ. & Ry. p. 294,) it was held, that to state a person to be in the King's peace, is to state that he is a subject; and the conclusion of an indictment *contra pacem*, implies that the criminal is a subject. If a subject, he must owe, at the least, local allegiance. Now, a person not "*coming*" into this country, or on ship-board, (which is the same thing) but being forcibly taken, does not owe local allegiance, and is not therefore triable by our laws.

ALDERSON, B.—Suppose a Frenchman kidnapped and brought into this country, would he not be triable if he committed a murder here?

Dr. *Harding*.—That point has never been decided, but if it arises, will be a case for argument.

The last point is, that even if the prisoners were in British territory, and the offence was against the Queen's peace, they are not guilty of murder. It does not appear that any unnecessary violence was committed in regaining that freedom of which they had been unjustly deprived. In Foster's *Crown Law*, (c. 8, s. 9,) if any mistake be made in any process, or if any officer exceed his authority, a person resisting that process or authority, and killing the officer, is only guilty of manslaughter. If then the prisoners' liberty was improperly invaded, or the officers exceeded their authority, they are not guilty of murder, and upon these grounds have been improperly convicted.

Sir *J. Dodson*, *Queen's Advocate*, for the Admiralty.—The capture of the *Felicidade*, and of the *Echo* was lawful; and both were, at the time of the transaction on which this conviction is founded, in the lawful custody of the Queen's officers. The material point is, whether or not the capture of the *Felicidade* was lawful? The circumstance of her having no slaves on board, has been mainly relied upon, as a contravention of Article 5, of the treaty with Portugal in 1817, said to be adopted by the treaty with Brazil: but for the proper elucidation of this question, it is necessary to refer to the convention between Great Britain and Brazil, recited in the 7 & 8 Geo. 4, c. 74. The first article of the treaty is this: "It was agreed upon and concluded between the high contracting parties, that, at the expiration of three years, to be reckoned from the exchange of the ratifications of the present treaty, it should not be lawful for the subjects of the Emperor of Brazil to be concerned in the carrying on of the African slave trade under any pretext, or in any manner whatever, and that the carrying on such trade after that by any person, subject of his Imperial Majesty

should be deemed and treated as piracy." The second article of the same convention is thus recited: "His Majesty and his Majesty the Emperor of Brazil, deeming it necessary to declare the engagements by which they hold themselves bound to provide for the regulation of the said trade till the time of its final abolition, did mutually agree to adopt and renew, as effectually as if the same were inserted word for word in the said convention, the several articles and provisions of the treaties concluded between His Majesty and the King of Portugal on this subject on the 22nd of January, 1817, and the several explanatory articles which have been added thereto." From these two articles, it appears that from the 13th of March, 1830, reckoning the three years from the ratification of the treaty, the slave trade was altogether prohibited to the subjects of England and Brazil; it was made piracy, and persons engaged in it were declared to be pirates. Then came the stipulations, "that until the time of the final abolition of the slave trade, the Portuguese treaties of 1815 and 1817, and the additional articles, should be the rules by which the trade was to be regulated." But the necessity for these rules, and consequently their application, ceased after the 13th March, 1830; and if so, any British vessel had a right to seize and detain any Brazilian vessel engaged in the slave trade, and the persons on board her. It need not be contended that we could have tried the prisoners as pirates, without an act of our Legislature enabling us to do so; but we might have passed an act to that effect; it is enough to contend, that we had a right to take them into custody as pirates, although they must subsequently have been liberated. Supposing, however, that the Portuguese treaties were in force, and formed part of the Brazilian treaty, they must be considered with reference to the first article of that treaty; many at least of the conditions of the former treaties cannot override that first article. For instance, by the Portuguese treaty, the slave trade would be lawful south of the Equator; there were also stipulations relative to passports for vessels, legitimately engaged in the slave trade;

now these could not apply after it became piracy to carry on the slave trade under any pretext whatever.

POLLOCK, C. B.—There are certain clauses in the treaties with Portugal, wholly applying to illegal slave trading. These clauses could not apply until the term of three years had elapsed from the ratification of the treaty with Brazil, because, until then, the trade was not illegal. The term "*mutatis mutandis*," with reference to the adoption of the Portuguese treaty, must be taken where it is applicable.

Sir J. Dodson.—The additional article of March 15, 1823, appended to the Portuguese treaty provides, that in consequence of vessels being found to put their slaves on shore, just before being visited by ships of war, if there should be clear and undeniable proof of slaves having been put on board in the particular voyage, for the purpose of traffic, such vessel shall be detained by the cruiser, and shall be finally condemned by the Mixed Commission. If Captain Usher had reasonable ground of suspicion, he would have been justified in taking this vessel into port, with a view to investigation. It is an error to suppose that a vessel cannot be legally captured, unless the capture be followed by a condemnation; for what would be the use of a Court of Justice, if the parties were to be quite sure of the facts, before taking the vessel to be adjudicated upon? If wrongfully taken, these parties had an express remedy given them by the treaty, by which they were bound, and could not be justified in taking the law into their own hands. As to the instructions on board the *Wasp*, it must be assumed, that after 1830, (when the slave trade was made piracy by the Brazilian treaty), instructions were sent out conformable to that state of things, and different from those applicable to Portuguese vessels, which were allowed to engage in the trade under certain restrictions.

PARKE, B.—Still where was the clear and undeniable proof that slaves had been put on board in that voyage?

Sir J. Dodson.—There was reasonable suspicion: for the vessel had been hovering for four days about the coast, and that

was sufficient to warrant her being taken, in order that clear and undeniable proof might subsequently be given to the Mixed Commission. It is the practice of being colourably without slaves when actually visited, that led to the additional article of 1823; but after the total abolition of the slave trade, the treaty applied to all vessels equipped for it. The judgments of the Courts of Mixed Commission at Sierra Leone and Rio Janeiro, (the only competent tribunals) decide this. The cases, though not regularly reported, are certified by the Judges themselves, and printed in the slave trade papers laid before Parliament. In the papers for 1839 and 1840, there is the case of the *Enterprenhador* before the British and Brazilian Court in Brazil, where a vessel was condemned under the treaty for having been equipped for the slave trade, on the ground that she had no right to go any where for slaves and the equipment was "*prima facie*" evidence of an intention to do an illegal act. The case of the *Fortuna*, (1 Dodson, 86,) showed Lord Stowell to be of opinion, that if a ship were equipped for the trade in spite of a prohibition to traffic in slaves, the captors had a right to board and bring her for adjudication; differing from the case of the *Louis* where no treaty existed, authorizing visit or search. The onus of showing the slave trade to be lawful lies on the party asserting it: it is so laid down in *Kent*, (p. 1, *Lec.* 9,) where he says that the slave trade is equally piracy, whether made so by treaty or municipal law. If the Emperor of Brazil entered into a treaty with Great Britain, declaring the slave trade to be piracy, it must be presumed that there was a law in Brazil prohibiting it, at the least the treaty is an undertaking that such a law shall be made: nor can a Brazilian subject taken in pursuance of that treaty, be heard to contend that there is no such law. It has been said that the British Legislature, by 5 Geo. 4, c. 113, makes a distinction between carrying on the slave trade, and being equipped for carrying it on, between owners of vessels and mariners, &c.; but that statute applies only to English subjects, and therefore the argument drawn from it in favour of

Brazilian subjects fails. It is true that the case of the *Enterprenhador*, gives only the British view of the subject, being a condemnation at Sierra Leone by the British Commissioner; but there is also the case of the *Maria Charlotta*, which was carried into Rio, on being captured, equipped for the slave trade, but with no slaves on board; the Brazilian government consented that the case should go before the Court.

LORD DENMAN, C. J.—The conduct of the government can hardly properly be cited: but if its consent was given, that would tend to show, that the Courts did not feel authorized to condemn without it.

SIR J. DODSON.—The *Esperanza*, equipped for the slave trade, but with no slaves on board, was captured by the very Captain Usher who captured the *Felicidade*, about the same time, and under the same circumstances: she was taken to Rio and condemned. It has been argued, that in all such cases there is a right of resistance and recapture, so that if English officers take vessels under any circumstances not sufficient to warrant their condemnation, the crew of those vessels have a right to murder them. The crews of neutrals captured in war have no right to rise upon their captors, and rescue the ship by violence, but are bound to abide the sentence of the proper Court in the country of the captor: an attempt to rescue would render a neutral liable to sentence and condemnation. *The Dispatch*, (3 Rob. 278.) Here the treaty gives a right of visit and search: every Brazilian subject has agreed to that.

PARKE, B.—He has agreed to what the executive government has agreed to; but the question is, has he, by the treaty, agreed to any thing more than a seizure, by a British officer with proper instructions?

SIR J. DODSON.—The officer's exceeding his instructions would not justify a rising upon him. The captain's commission was on board, and if he exceeded it he did not therefore become a pirate. (*Bynk. Quæst. Jus. Pub. Lib.* i. c. 17, p. 127). Sir *Lionel Jenkins*, indeed, in one case (*Wynn's Life*, p. 94,) has thrown out that a capture by a privateer, exceeding his

authority, might be punished as piracy : but that doctrine has been long exploded. With respect to the *Felicidade*, it has been admitted that the visitation and search were lawful, if so, the detention was lawful, either for the purpose of taking her to be adjudicated upon by the Mixed Commission, or the crew to be tried for piracy in Brazil.

The capture of the *Echo* was made by the jolly-boat of the *Wasp*. There is nothing to show that the lieutenant should be the first person to enter the ship. Previous to the vessel striking her colours, there had been a visitation and search by the lieutenant in the strictest sense of the word. The vessel was taken by a British officer in a British jolly-boat ; but, even if taken by the *Felicidade*, the capture would have been good. But it cannot be supposed that every trifling deviation from the instructions of the treaty, which circumstances may render necessary, or every trifling omission or act of carelessness on the part of officers, can justify the crew of a slaver in rising upon them, and putting them all to death. The only remaining question is, whether these vessels being lawfully captured, and in possession of her Majesty by her officers, the Queen's jurisdiction is established in them? It was argued that the property in the *Felicidade* was not changed till condemnation and sale : it is not necessary for the purposes of jurisdiction that it should be changed : temporary possession and custody of her Majesty, lawfully obtained, is sufficient to ground jurisdiction. Vessels may be considered for some purposes as floating islands ; if her Majesty takes possession of an island, the law of England is there established if her Majesty choose.

PARKE, B.—The old law remains in force till the Queen orders otherwise.

ALDERSON, B.—Then another question arises, ought not this offence to be tried by Brazilian law?

POLLOCK, C. B.—The jurisdiction of the Admiralty does not extend to islands. Is there any case which decides that neutrals captured are under British law before adjudication?

Sir J. Dodson.—There is not. The deck of a vessel in the

lawful custody of the Queen, is part and parcel of British land, not, indeed, to all intents and purposes, but sufficiently so for the purpose of jurisdiction. On this principle, the crew of a neutral captured by a British man-of-war, and rising on their captors, would be triable in England. The prisoners, therefore, having committed an offence on British territory, are subject to the jurisdiction of the criminal Courts of Britain. The rest of the argument only relates to the amount of the crime.

Dr. *Addams*, in reply.—The provisions of the former treaty with Portugal were in force up to the 13th of March, 1845. The separate article to the former treaty declared that the whole treaty should be in force for fifteen years after the total abolition of the slave trade on the part of Portugal. This was adopted '*mutatis mutandis*.' The treaty can operate only as a contract on the part of the prisoners to submit to capture under certain conditions, which have not been complied with. No case has been brought to show that the crew of a captured vessel between the times of seizure and being brought into port, become subjects of the capturing country. If the seizure be illegal *ab initio*, no incipient conversion of the property takes place. The cases cited from the Parliamentary papers, are not authorities, it is, therefore, unnecessary to say how the Courts of Mixed Commissions are constituted. The wrongful act, whether of the English officer or of the English government, could not deprive the prisoners of the natural right of resisting and rescuing themselves from unlawful custody. By the additional act of 1823, there must not only be suspicion of slaves having been on board, but clear and undeniable proof, to justify detention. The *Echo* had been visited several times before by Lieutenant Stupart, when she must have been equipped for the slave trade. It must be presumed, that he did not capture her because she had not slaves on board. The visitation and search of the *Felicidade* was lawful, but not her detention. With respect to jurisdiction over foreigners in time of peace, the general doctrine is, that it is founded on mutual con-

sent. In the case put by *Alderson, B.*, of a Frenchman kidnapped and dragged to this country, committing an offence here, the proper course would be to send him to France for punishment, and a refusal on the part of France to punish him, would be a subject of remonstrance, and possibly a "*casus belli*." Bare possession by a Queen's officer cannot possibly confer jurisdiction. Such could not have been the ruling of the learned Baron. Lawful custody must be taken to have been assumed in the charge of the learned Baron, otherwise there could have been no plot to murder, but merely a plan to regain liberty by violence.

Dr. *Harding*, in reply.—The 8 & 9 Vict. c. 122, recites, that the machinery for the regulation of the Mixed Commissions, established by the treaty with Portugal, was then going on. The case of the *Fortuna* and others cited, only go to this, that parties having been captured in war, claiming restitution, must come into Court with clean hands. *This* case stands in its original position, that an unlawful seizure does not transfer allegiance.

[The prisoners have been discharged, the Judges being of opinion that at the time of the commission of the offence charged, they were not within the Queen's jurisdiction. Lord DENMAN, C. J., and PLATT, B.; *dissentientibus*.]

LONDON :

PRINTED BY RAYNER AND HODGES,
109, Fetter Lane, Fleet Street.

